HINTS TO HONEST CITIZENS

# ABOUT GOING TO LAW.

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BY

ARTHUR JOHN WILLIAMS.

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# PREFACE.

It has been my lot for many years to sit in our law courts whilst civil disputes have been tried, and whilst those accused of criminal offences have been put upon their deliverance. During all these years the prevailing feeling in my mind has been that of sadness at witnessing the misery and ruin to say nothing of the pain, mortification, and vexation, caused through the want, on the part of those who were the chief actors in the business, of information which they ought to have been able to obtain. The following pages are an attempt to supply some of this information in a simple and intelligible form. I think I may venture to say that so far as it goes it is trustworthy, and will,

though popular in expression, bear the criticism of the exact lawyer. It may be as well, however, to add, that it will be found of service only to honest men. My friend Mr. William Evans, of 3, Essex Court, Temple, author of "The Law of Principal and Agent," has kindly gone through the proofs to see that my law has not become rusty, and has made several valuable suggestions.

*March*, 1885.

# CONTENTS.


## CHAPTER I.

HOW TO AVOID GOING TO LAW.

Why Lawsuits are undesirable—How they originate—Hints for those who enter into Business Negotiations—How to safeguard Correspondence—The Legal Adviser—Importance of Exactness in Business Transactions—Agreements and Letters—The Statute of Frauds—Its mischievous Provisions—Libel or Slander Cases—"Character" of Servants or Employés—Assault and Battery—How to act when a Claim is made against You——With a View to Settlement—Submitting to Arbitration—Objections to Reference—Consulting the Solicitor—How to act when a Writ has been served—Taxes upon Justice . . . . . 11

## CHAPTER II.

HOW TO RESIST AN UNFAIR CLAIM.

In the County Court—How to act on the Day of Trial—What your Witnesses can prove—Compelling the Attendance of Witnesses—The County Court Officials—Undefended Cases—The Plaintiff's Case—Judges and Judges—What a competent Judge can do—The Plaintiff in the Box—Leading Questions—Cross-examination—Apparent False Swearing—How to put your Questions—The Defendant's Case—Defendant in the Box—His Witnesses—The Judge's Summing-up—The Decision—How to act under Defeat—Applying for a Rehearing—Actions in the High Court—Personally-defended Cases . . . . . 55

## CHAPTER III.

HOW TO ASSERT A JUST CLAIM.

How to act when you are the Plaintiff—Personal Considerations—The Procedure in the County Court—High Court Difficulties—Aim at a reasonable Settlement . . . . . 91

## CHAPTER IV.

### HINTS TO WITNESSES.

How you may come to be a Witness—Caution as to Witnessing of Signatures—The Witnessing of a Will—Hints to Accidental Witnesses—Prudence of making a Memorandum of Facts and the Like—Compulsory Attendance as a Witness—The Subpœna—Rate of Expenses—Penalties for neglecting the Subpœna—Minor and Grave Offences—Witnessing on Summons or under a Warrant—Scale of Expenses for Professional and Ordinary Witnesses—Hardship of the System—Taking down your Evidence—Hints about Depositions—What to do when your Case comes on—In the Witness-box—Taking the Oath—Examination-in-Chief—Leading Questions—Cross-Examination—Browbeating—Attempts to Discredit—Conflicting Evidence—Re-Examination—Production of Writings—Notices to Produce . 97

## CHAPTER V.

### HINTS TO JURYMEN.

Liability to serve—Special Juries—Persons exempt—Jury Lists—Defects of the present System—The Grand Jury—Common and Special Jurors—The Swearing-in—The Foreman—Hints to Jurors during a Case—The Summing-up—Considering the Verdict—Certificate of Service . . . . . 145

## CHAPTER VI.

### THE POLICE COURT.

A Word of Advice—Before the Magistrate—Cost of a Summons—Hardships of the Fee System . . . . . 173

APPENDIX . . . . . 179

INDEX . . . . . 183

# About Going to Law.

## CHAPTER I.

### HOW TO AVOID GOING TO LAW.

Why Lawsuits are undesirable—How they originate—Hints for those who enter into Business Negotiations—How to safeguard Correspondence—The Legal Adviser—Importance of Exactness in Business Transactions — Agreements and Letters — The Statute of Frauds—Its mischievous Provisions—Libel or Slander Cases—"Character" of Servants or Employés—Assault and Battery—How to act when a Claim is made against You—With a View to Settlement—Submitting to Arbitration—Objections to Reference—Consulting the Solicitor—How to act when a Writ has been served—Taxes upon Justice.

I CANNOT begin my advice to honest citizens better than by advising them how to avoid going to law. For a lawsuit is a serious misfortune. Apart from the proverbial uncertainty of the law, the settlement of a dispute by litigation is a most worrying matter. It tries the temper, it affects the health, it wastes time, and, even where successful, it is expensive. Those who have not found out by experience what going to law means, think that if

they win a lawsuit the other side will have to pay everything. They are sadly mistaken. Unless it is a trifling matter, such as a County Court case, in which no lawyer's help has been obtained, the successful party has always to pay more than the costs which his opponent pays him.

Then, again, when litigation begins, no one knows not only how, but when and where it will end. He who goes to law with clear right on his side may find that his case involves some curious point of law never yet decided. This fills the minds of all clever lawyers who have to consider it with profound satisfaction. It is adroitly carried, amid endless argument, from one court to another until it reaches the House of Lords. By the time that august judicial assembly has decided it, the man with the clear moral right on his side, whether the decision is in his favour or against him, has probably been ruined.

In every lawsuit there must be two parties: the plaintiff, who has a claim, the defendant, who disputes it. It is clear that no one need go to law—that is begin a lawsuit—unless he chooses. But the person who disputes a claim is differently

situated. He, of course, cannot begin litigation. The positions of one who has a good claim against another, and of one against whom a claim is unfairly made, are in many ways different. But with respect to precautions for avoiding litigation there are some general rules which apply equally to both. These I will now deal with.

Most of the disputes which lead to lawsuits arise, broadly speaking, from business transactions, such as the purchase of goods, the hiring of servants, the taking of a house, and so on. Now, the first general rule for avoiding litigation, is to **be quite clear in your own mind when you begin, or at all events before you finish, the negotiation, as to what it is you want.** This, no doubt, sounds like a truism. Nevertheless, nothing is so common as indefiniteness, even in the most ordinary affairs, and nothing causes so much mischief.

The second general rule for avoiding litigation is to **make what you want clearly known to the person with whom you are dealing.** Take a familiar example. You are furnishing a house, and see an article of furniture which you think will suit you. But you don't want to commit yourself to

buying it without seeing whether it does really suit. The seller wishes to conclude the bargain at once. His interest is to have the transaction treated as a sale. Be careful in such a case to make it distinctly understood that the article is to be sent on approval. And unless its price is very trifling, make no bargain at the shop; but wait till you get home, and then state by post-card or by letter—of which you will, of course, keep a copy—that you are willing the article should be sent on approval; because another important rule for avoiding litigation is that **where the matter is of any importance, the terms had better be in writing.** And whenever the negotiation involves not only an exchange of proposals, but legal obligations—as, for instance, where you are coming to terms for taking a lease of a house—begin the first letter of any correspondence by saying, "**It must be distinctly understood that nothing is to be binding on either side until the terms, if any, which may be finally arranged have been put into writing, and signed by both parties.**" This will protect the writer against the serious risk of suddenly finding that he had entered unwittingly into a binding agreement. It also—as it in fairness

should do—equally protects the other side against this risk. At the same time it leaves both parties quite free, not only until they are themselves at one, but until each has had the opportunity of making sure, by consulting his solicitor, that there are no legal difficulties or dangers in the proposed terms which he had not realised. I may mention that I have had repeated practical experience of the value of this provision.

For these pages, which are intended to serve those who are not lawyers, are by no means intended to make them their own lawyers. Their object is to save them from going to law, not from going to lawyers when the occasion really makes it desirable that they should do so. That occasion occurs whenever something has to be done which requires special legal knowledge. There is no need for special legal knowledge in choosing a house, in judging whether it is suitable, or as to its condition, or as to the reasonableness of the rent or premium. These are matters about which he who is looking out for a house ought to be able to decide for himself. And he may safely do so, if he takes care at the outset of the business to use some

such words as I have just given. When, however, the terms have been thus provisionally settled, the sooner he goes to his solicitor the better.

It may be as well here to say something on the important subject of the legal adviser. Whenever you want legal advice take great pains to secure the best you can get. Even in view of possible litigation, those solicitors who have most to do in the way of lawsuits are, as a rule, to be avoided. I say, as a rule, for of course there are many exceptions. But it will generally be found that the safest and most useful solicitor is he who has a good, quiet, private practice, and whose name appears rarely in actions at assizes. Men of this stamp are averse to litigation both from principle and from inclination. If all the legal work of the country were in their hands there would be much less litigation than there is at present. Through their good offices a vast amount of litigation is avoided. For when a client who has got into a dispute comes to them, their efforts are always directed towards settling it. They may not be so knowing about the details which your sharp lawyer has at his fingers' ends. But

they treat an action as a kind of legal disease which should be stopped as soon as possible, whilst the sharp lawyer is too apt to regard it as an interesting case full of profitable chances for making costs in the cause. On the whole, therefore, the steady-going respectable solicitor is not only the safer, but the cheaper adviser. Having chosen a thoroughly trustworthy solicitor, never, if you can help it, enter into any binding engagement of any importance until you have consulted him. It is impossible, of course, to lay down any rule as to the stage at which you should consult him. This will depend very much on the nature of each transaction, and you must exercise your good sense and discretion as to this, bearing in mind that if you have preceded your negotiation with the words already given (p. 14), you need not go to him until all the terms are pretty well arranged.

It is plain, however, that in by far the largest class of business transactions the introduction of such words would be quite out of the question. The vast business of this country could not be carried on at all if every contract was submitted to a lawyer, and if every possible contingency had

to be guarded against or provided for. There is, indeed, a curious prejudice, in commercial circles, against legal interference in ordinary business affairs. The shrewdest man of business will not hesitate to conclude by a letter or even a telegram negotiations which involve many thousands of pounds. Most of the enormous commercial engagements of this country, to the extent of millions daily, are thus entered into, and a large proportion of the engagements thus entered into might be repudiated on technical grounds. The positive morality of commerce is, however, strong enough to enforce them. Any attempt to evade such engagements on the ground that they are not legally binding would practically ruin the position of a firm. It is mainly due to this that the countless commercial transactions of this kingdom gave rise to only 1,798 trials in our Common Law division of the High Court of Justice during the year 1880. Of these 1,008 were tried in London and Westminster, whilst 790 were tried in the provinces, and in 656 out of these 1,798 cases, none of the verdicts were for more than £100!

The very loose way, however, in which business

is done and contracts are made is a constant source of misunderstanding. The habit of exactness, therefore, cannot be too carefully studied. In our country, where the law has never been reduced to anything like a systematic code, it is not to be expected that men intended for commerce or manufactures should master our commercial law as the Germans do theirs. I should, however, strongly advise any one who intends to place a son of his in business to place him first in a solicitor's office for a year, and then, if he can manage it, give him a year in the chambers of a barrister who has a good commercial practice. Large firms, particularly those firms which are engaged in transactions involving contracts, such as charterparties or forward contracts, which have to be very carefully drawn up so as to meet constantly changing conditions, would do well to take into the business one of the many able men who have qualified themselves for, but have not yet obtained, practice at the bar. I know of more than one instance in which such men have become members of great firms, and have proved to be of invaluable service. Their legal knowledge, tempered by cultivated intelligence and a high moral

tone, enables them to hit the happy mean between the higgling of the mere solicitor and the heedlessness of the ordinary man of business. They will, of course, not choose such a man merely because he is a good lawyer. He may be the best lawyer at the bar, and yet if he is a mere lawyer he will be worse than useless. He must be a man of good common sense, with an aptitude for affairs and for doing the everyday work of the world.

I have said that these pages are not intended to make those who may read them "their own lawyers." But there are some rules ignorance of which often causes much serious mischief. It is most desirable, therefore, that their practical bearing upon the ordinary affairs of life should be as widely known as possible. The first of these rules is that **where the terms of any agreement have been put into writing, the agreement can only be proved by the production of the writing.** The practical bearing of this rule is sufficiently clear. If you ever do carry on a negotiation by letter, **take care that you keep an exact copy**[1] **of your own**

[1] A press copy will of course be the best copy. Sturge *v.* Buchanan, 10 Ad. & E., 598.

**letters, and that you also keep every letter you receive in reply.** It is possible that this correspondence may come to be an agreement;[1] though, as I have already said, it is much better where the matter is of any importance that you should expressly guard against this possibility.[2] But in any case it will be the material out of which the final agreement will have to be drawn up. Our law has provided certain exceptions and qualifications which are intended to prevent this rule from working injustice. I shall deal with them in another chapter, but what should be borne in mind is that if this rule is carefully observed, the necessity for considering these exceptions and qualifications will be avoided.

The practical effect of another rule is that where goods to the value of £10 or more are sold or agreed to be sold, **the bargain cannot be enforced unless the person against whom it is sought to be enforced has signed a memorandum which embodies**

[1] If so, be sure that within fourteen days it is taken to Somerset House, or if you live in the country, to the Distributor of stamps for the district, and stamped with a sixpenny stamp. If not, it can be given as evidence only on payment of a penalty of £10. Agreements for the sale of goods need not be stamped.

[2] See *ante*, p. 14.

**the terms of the agreement.** Thus, if you are buying goods, the price[1] of which is £10 or more, and you wish to hold the person who has sold them to his bargain, you must—unless you pay for them at the time—get him to sign a memorandum, or, if the business is done by correspondence, a letter, agreeing to sell the goods. If the business is done by correspondence the letter signed by him need not of course embody the terms if it refers to the other letter or letters in which the terms are contained. This applies also to negotiations conducted by telegraph. When a person sends a telegram and writes his name as the sender, it is the same as if he signed his name to a letter.[2]

Whether the terms are contained in a memorandum or correspondence they should be made as clear as possible. **Material things to be stated are the names of both parties,[3] the goods which are the**

[1] I use the word "price," for though Lord Tenterden's Act (1 Geo. IV., c. xiv., s. 7) extends the enactment to contracts where the goods are of the "value" of £10, in the ordinary business of life the price is stated.

[2] Godwin *v.* Francis. L. R. 5 C., P. 295.

[3] Champion *v.* Plummer, 1 B. & P. 252. Newell *v.* Radford, L. R. 3, C. P. 52.

subject of the bargain,[1] and the price.[2] Where no price has been agreed upon, it cannot of course be stated, and need not be stated. If, for instance, you write to a coachmaker—"Build me a fashionable and handsome landau," you are bound by the letter though no price is named.[3] But if you are a prudent person you will conclude no bargain until the price has been definitely settled. Provided the terms are clearly stated, it does not matter how they are expressed. If, for instance, a traveller calls on you, and you give him an order, and he enters it in your book as follows—"Mr. N. (meaning you), 32 sacks of flour at 39s., to wait order," and puts his initials at the foot, this memorandum binds his employer.[4] But it required expensive litigation to decide that this very bald entry was sufficient; and I repeat that care should be taken to make the terms quite clear.

There is probably no class of business transactions which has given rise to more vexatious

[1] Sarl *v.* Bourdillon, 26 L. J. C. P. 78.
[2] Elmore *v.* Kingscote, 5 B. & C., 583.
[3] Hoadley *v.* McLaine, 10 Bing., 482.
[4] Newell *v.* Radford, 3 C. P. (L.R.) 52.

litigation than those which come within this rule of our law. It was laid down in an Act of Parliament[1] made more than 200 years ago. The title of this Act is "An Act to Prevent Frauds and Forgeries," and it is commonly known as the Statute of Frauds. It deals with many other matters than contracts for the sale of goods, with which alone we are now concerned, and it was declared by its author[2] "that it was an Act every line of which was worth a subsidy." Another person[3] has said much more correctly that "every line of it has cost a subsidy." Instead of preventing frauds and perjuries it has been the source of endless frauds and perjuries. For two centuries the ingenuity and astuteness of trained legal minds have been devoted to the work of evading by nice distinctions the arbitrary rules it has laid down, rules which so far as they are wise in principle should have been left to the common sense of mankind to work out. I am not now speaking only of this clause about contracts for the sale of goods worth £10 and more; I am speaking of all those of its provisions which

[1] 29 Charles I., c. 3, s. 17. [2] Lord Nottingham.
[3] Taylor on Evidence, 2, 870.

render it necessary that certain engagements which come within the ordinary dealings between man and man shall not be binding unless reduced into writing and signed by the person who is to be charged. Take, for instance, a case where a man you know comes to you and says, "I have a young relation who is setting up in business. I will answer for his paying for any goods you may supply him with up to £100." You consider his guarantee sufficient, and say you will do so. But under ordinary circumstances you will add that in order to prevent the possibility of misunderstanding, he had better write you a letter to that effect. Suppose, however, that for some reason you do not take this precaution. The goods are supplied. The young man fails. His guarantor, though the fact that he had given you his undertaking is clear, is able to repudiate it. And why? Because there is a section in this Statute of Frauds[1] which provides that a man who has given such a guarantee may snap his fingers at you if it is not in writing and signed by him. The time is, I hope, not remote when the true principle which should be applied to

[1] S. 4.

this branch of our law of evidence will be adopted; namely that no direct evidence of a fact which is to be proved shall be excluded, but be accepted for what it is worth.

The above observations have assumed that you are buying or ordering goods. They are, however, equally applicable where you are selling or taking an order for goods. If the transaction is not completed either by payment for the goods or by their being taken away, you will have no hold upon the purchaser unless you take the precaution I have already explained. I have not thought it necessary to say anything of the exceptions of the 17th Sec., which make the contract "good if the buyer accept *part* of the goods or gives something unearned to bind the bargain or in part payment." They are of no practical importance, and would only perplex the reader.

In all cases where you are entering into engagements for the sale or purchase of goods which are to be made or which are to be supplied at intervals, the greatest care should be taken to state the terms precisely. The safest course is to avoid such engagements as far as possible where the goods are

subject to considerable fluctuations in price, as is the case in many of our great staple industries.

In many instances, however, forward contracts of this kind are absolutely necessary. A railway company must make provision for the supply of coal and other stores in advance of its immediate daily wants. A manufacturer must equally make arrangements in advance for the supply of raw material. But I am convinced, from long observation of the course of business in many of our largest branches of trade, that he does best in the long run who anticipates the future as little as possible, and enters into engagements both as buyer and seller only for a reasonable time ahead.

I have dealt hitherto with ordinary business transactions. But there is another relation of life in which much mischief is often done and much vexatious litigation caused through the non-observance of one or two rules of our law which have been laid down by our judges with reference to what we are justified in saying or writing about the character or conduct of our neighbours. These rules, like most of the law which, instead of being made by Act of Parliament, has

been made by the decision of great judges, are founded upon wise and broad views of what is fair and reasonable. They are, indeed, such rules as discreet and honourable men would lay down for themselves. It is not necessary that I should attempt to explain the nice distinctions which our courts have made between written libel and spoken slander. I need only state here for your guidance the practical effect of these rules. Broadly speaking, then, our law says that if any one has done what is wrong or foolish you may make known the fact. But it has added this important condition, that **you will be liable to an action for libel or slander, if it appears from the surrounding circumstances that on making known this fact you have been influenced by malicious motives.** Substantially the law says, what common sense and right feeling say, that you are not justified in making known what is or seems to be to the discredit of your neighbour, unless there are circumstances which render it a moral duty on your part to do so. The judges have interpreted this rule very widely.[1] But the only

[1] They have decided that if a parishioner hears anything said which affects the character of her rector *and another person*, she

occasion on which you can properly and prudently express an opinion of the character or conduct of another is when he or she has been in your service, and you are asked to express your opinion by an intending employer. You will do wisely to adhere strictly to this rule, and never volunteer an unfavourable opinion of any one, except in the case of very intimate friends, on whose discretion you can completely depend. Even then you had better keep your opinion to yourself, unless you have reason to think that your friend may suffer through your withholding it. **When asked for your opinion, if your reply must be unfavourable, take care to mark your letter "private and confidential."** It is one of the few occasions on which these much-abused words may be fairly used. You will, of course, be careful to say nothing of which you are not quite sure. You have no right to take a character away upon mere surmise.

is not liable to an action for slandering the other person if she goes and repeats the story to the rector (Davis *v.* Snead, 5, Q. B. L. R., 608), so that he might have an opportunity of clearing his character. This privilege of telling the person affected ill-natured gossip is one which seems very questionable. (See also Lawless *v.* Anglo-Egyptian Co., 4. Q. B. L. R. 262.)

And even in stating facts as to the certainty of which you have no doubt, be sure that you do not overstate them.

There is no moral duty more difficult to discharge properly than that of expressing opinions as to character, particularly in the case of domestic servants. It speaks well for human nature that, as a rule, masters and mistresses are more impressed by the good qualities of servants who are leaving them than by their defects. But it should be as widely known as possible that an ill-natured master or mistress has not, as is very commonly supposed to be the case, the power to blast the future of a servant who has caused displeasure. The employer is liable to an action for libel if the expressions either in the letters, or in the surrounding facts of the case, show that there has been actual malice, even though the statements made are true.[1] There is another hardship to which servants are exposed. Occasionally an employer refuses to give a character, though he has nothing to say against the servant. Such a refusal may be absolute ruin to the servant. There does not seem to have been any case in which it has

[1] Spill *v.* Maule. 4 Ex. (Ex. Ch.) L. R. 232.

been decided that an employer can be compelled to give a character. But I think such a refusal is—at all events, it ought to be—a wrong for which a servant against whose honesty and trustworthiness nothing can be said should be entitled to damages.

There is another unpleasant incident to which every one is liable. Circumstances may occur in which no amount of temper or forbearance can save you from being assaulted. The most peaceable citizen is liable to be wantonly attacked. In that case all he can do is to defend himself. But assaults do frequently occur where the person assaulted, and improperly assaulted, might, nevertheless, by the exercise of judgment and forbearance, have prevented the assault. There are, however, scarcely any cases in which you are called upon to begin an altercation. I say scarcely any, for there are some. I take it to be the duty of every Englishman, to interpose whenever he sees woman, child, or animal, subjected to brutal treatment. Even then resolute remonstrance is generally effectual without direct interference. As a rule, however, always stand aloof from street "rows." You will, of course, if you are sensible, carefully avoid entering into an

altercation. If a quarrel is thrust upon you, whatever the provocation may be, never strike the first blow, and take care early in the business to call the attention of the bystanders, if there are any, to the fact that you are not the aggressor.

I now come to another state of things, that, namely, in which a dispute has arisen between yourself and another. Such a dispute may arise in one or two ways. Some one makes a claim against you, or you make a claim against some one. In each of these two cases your position and the course you had better take will be somewhat different. I will first, therefore, deal with the case of a claim against yourself, though I may observe that much of what I am going to say applies equally to cases in which you think you have a just claim against some one. A claim against yourself involves two distinct preliminary questions. First, is it a just claim? Second, is it one which can be enforced? It also involves another question, namely, if it is unreasonable and can be resisted with a fair chance of success, is it as a matter of prudence—as opposed to mere feeling—wise to resist it? I will postpone the consideration of this last question

until the two preliminary questions have been disposed of.

And first as to the justice of the claim. A claim against yourself means that you are called upon to submit to something which is to your own disadvantage. The natural instinct of mankind is to see only the reasons for thinking such a claim unreasonable or unfair. Few minds are so well-balanced as to be above the influence of this instinct of self-interest. Where they are, there is generally found more or less unfitness for the practical affairs of life. It is, however, most important that the tendency of this natural instinct to distort facts and warp the judgment should be carefully guarded against.[1] Bear always in mind, therefore, where a claim is made against you that —at all events in the ordinary business of life— each party to a bargain is entitled to do the best for himself, provided he does or says nothing

[1] Nothing shows this in a more striking manner than the statistics of the 658,690 plaints actually tried in our County Courts in 1879—80. Of these actions 642,043, or 92 per cent., resulted in favour of the plaintiff; only 16,647, or 2 per cent., in favour of the defendant. The remaining 8 per cent. were settled, but in what way does not appear. *Jud. Stat.*, 1880.

purposely which deceives or misleads the other. The first thing you should do when a claim is definitely made against you is to **be sure that you have before you all the facts, not only against it, but in its favour.** Then if you have any doubt as to its being reasonable, submit the facts to some friend in whose sense and judgment you have faith. Be careful that you state them all fairly, without any colour or exaggeration or leaning to your own side. This is, no doubt, very difficult to do when one is directly interested. But it is possible, and the attempt to do it is one of the most wholesome exercises of moral as well as of mental training. Having thus stated the facts, ask your friend what he thinks of the claim. If he says unhesitatingly that he thinks the claim reasonable, you may be pretty sure that he is right. It will be as well, however, that you put before him any reasons which may have led you to form, or to lean to a different opinion; for it is just possible, though not very likely, that the bearing of some fact may have escaped his notice. Should he still hold to his view you will save yourself much trouble by admitting the claim at once. He may, however,

after discussion of the matter, come to the conclusion that though the claim is not unfounded, it might fairly be modified. In that case you had better suggest to the other side such modifications as you both consider to be fair. This you may safely do without going to a solicitor, if you put your proposals into writing, and conclude your letter with the following sentences:—"It must be distinctly understood that nothing in this letter or in any correspondence to which it may lead, shall, in the event of litigation, be either offered as evidence, or even referred to by either side unless —as I hope will be the case—it ends in a settlement, and letters have been exchanged between us in which the terms of the settlement are stated and are expressly accepted by both of us. I make this stipulation in order that we may both be able to explain our views and make any suggestions or proposals with a view to a friendly arrangement without any reserve." These two sentences will place yourself and the other side on a fair and equal footing, and they clearly explain what that footing is to be. This is far the best way of dealing with the matter in the first instance. If

**you use these sentences you may safely explain your views, and may with equal safety make any suggestions with a view to a settlement, for there will be no danger of your being led, as is so often the case, into a position from which you cannot withdraw.**

Such a letter must lead to one of three results: (1) a settlement; (2) a refusal to negotiate at all on the conditions laid down; or (3) a refusal to accept the terms which you think should be accepted. In either of the two last-mentioned cases you had better write offering definitely the terms you are prepared to give. Then add the following sentence, "It must be distinctly understood that this offer is made with the object of avoiding litigation, that I do not admit any liability whatever, and that if, unfortunately, litigation does ensue because the offer now made is refused, I alone am to be at liberty to put in evidence this or any subsequent letter." The words "without prejudice" are often used where offers with a view to a settlement are made. These words, however, are very vague, and their exact meaning has been the subject of much dispute, which has not even yet definitely settled whether the person using them may give

what he has written in evidence in his own favour —as, for instance, to show that he was anxious to settle a claim on reasonable terms.[1]

If the friend whom you consult is decidedly of opinion that the claim is one which is wholly unreasonable, one which ought not to have been made at all, write and say so. Then add that though you do not admit any liability whatever, you are quite willing to refer the whole matter, including the question who shall pay the expense of the reference, to any one who may be agreed upon by both sides, provided he hears only the parties concerned and their witnesses, it being distinctly understood that the person against whom the decision is given shall not be called upon to pay any law costs or expenses, except those which the person to whom the matter is referred may himself incur, in case he considers it desirable to obtain legal advice.

I am quite aware that cases have occurred where the attendance of solicitor or counsel has been prevented by express provision, and, the award being disputed, long and expensive litigation has ensued.

[1] Williams *v.* Thomas, 2 De Gex, and S. 37. Jones *v.* Foxall, 15 Beav. 331. Williams *v.* Thomas, 31 L. J. Ch. 674.

These cases are always referred to as showing the folly of trying to do without lawyers. Nothing can be more fallacious. There is always the risk of such litigation in every reference, and the risk is seriously increased when lawyers are employed. For the unsuccessful party, if in the hands of an enterprising solicitor, will often be induced to try to get out of the award upon some purely technical ground. The numerous cases in our Law Reports show how little any provisions that ingenuity can devise avail to prevent this. On the whole, there is certainly much less danger of this where the attendance of lawyers at the reference is forbidden; whilst in the great majority of cases where the reference is conducted, as it should be, by the parties themselves, it will cost very little. On the other hand, there is no saying what a reference may not cost if lawyers are allowed to conduct it. Be sure to provide that "**any agreement to refer may be made a rule of Court.**"

The plan which is most frequently adopted where disputes are submitted to arbitration, is that each side appoints an arbitrator, and the arbitrators so appointed before they enter upon the arbitration,

appoint an umpire to whom the matter is ultimately referred in case the two arbitrators cannot agree. This plan is open to many objections. Each arbitrator is almost always a partisan of the person who appoints him, and the two scarcely ever agree. Indeed they generally enter upon the business with the distinct intention of not agreeing, and all the work done before them goes for nothing. **Unless you can agree upon some one person whose decision shall be final, it will be better in most cases not to refer at all.** There is no branch of our contentious procedure which is more unsatisfactory than that which professes to enable those who have obtained an award in their favour to enforce that award. The power which our courts of law have jealously retained of supervising and controlling private settlements of disputes by arbitration, is no doubt a useful power when it is exercised for the purpose of rectifying disputes or preventing frauds. But it has been used with a technical narrowness which has rendered it far more mischievous than any possible evils it was intended to prevent. Unless the award is disputed on the ground that there has been some material error, or want of fairness, it

ought to be possible to enforce it in the simplest manner. At present an astute lawyer may throw endless obstacles in the way. If, therefore, the award is in your favour, and is disputed, you must apply to your solicitor; for his assistance will be absolutely necessary if you are forced to take proceedings. He will probably tell you that if you had come to him in the first instance the difficulty would have been avoided. This is not impossible, though very unlikely. Do not, however, attempt to disabuse his mind. There will be no insincerity in your allowing him to remain under this impression.

If the attempt to settle or refer the disputed claim fail, and litigation be threatened, you must now finally make up your mind as to whether you will ultimately submit to the claim. I say *ultimately*, because even if you have made up your mind not to incur the risk, annoyance, and expense of a lawsuit, it is in some cases desirable to show a bold front for some time after an action has been begun. Those who are threatened with a lawsuit usually go at once to a solicitor and place the matter in his hands. Where the matter is serious, and you have complete

confidence in your legal adviser, this is much the best thing to do. His experience and independent unbiassed judgment are quite worth the few pounds you will have to pay him. He will, moreover, conduct the business, where the claim is an important claim, with far more authority and effect than if you did the work yourself. Where you do place the matter in the hands of a solicitor, always bear in mind that he is your agent, or to use the old and appropriate word, which has been abolished by Act of Parliament, your "attorney." You will take care that he lets you know exactly what he proposes to do, and that nothing is finally settled without your express consent. He may be of opinion that though the claim is unfair or unreasonable, there is great doubt whether it can be successfully resisted, and he will probably suggest that the opinion of counsel should be taken. The effect of this is that he not only gets the view of another lawyer of special training, but that he relieves himself from responsibility. For, by our law, a solicitor may be liable for a mistake, but a barrister cannot be made liable, however ignorant or careless he may be. If there is anything of

importance at stake, you had better adopt the suggestion.

The opinion of counsel is sometimes decisive one way or the other. But far more often it leaves you in a state of doubt as to whether you will win or not. Those who have had any experience, as lawyers, of the knotty points which may be wrapped up in what seems a simple statement of facts, will know that I do not say this in an ill-natured spirit. It really is often quite impossible to say what will be the result of fighting the case. When this is so, you will have to make up your mind whether you will defend the action or not. In doing this your solicitor ought to be of great assistance to you. But you must always bear in mind that it is his interest that you should resist, and that even the best of lawyers is human. There is always, too, a tendency in the mind of the person you consult to take a partisan or one-sided view of the matter, especially where resisting an unfair or unreasonable claim means, as in the case of your lawyer, no possible loss, but certain gain, since whatever happens he will get his costs. You must, therefore, if he advises you to fight to the bitter end, test

his reasons very carefully, and accept his advice only if you are quite convinced that it is the sole course left to you. For I have no hesitation in saying that where doubt of success is expressed by the lawyers, it is quite impossible to say with any certainty which side will win. It is quite possible, however, that your lawyer will tell you that though you must make up your mind to give in, still you had better defy them, and let them begin an action against you. As long as only the formal steps in a lawsuit are going on the costs will be comparatively small. It is the final stages, the getting up of the defence, the preparation of the brief, and so on, which are costly. Before these are reached a judicious lawyer, though he does not mean to go to trial, may manage to settle a claim on far more reasonable terms than he could have got if he had given in before the action was begun.

In cases which are not of any serious importance, if you feel sure that you know what you are about, and that whatever the legal rights of the matter may be, the claim is not a fair claim, you run no risk and save expense by keeping the matter in

your own hands until you are told that unless you pay what is claimed proceedings will be taken against you. If you are a poor man—and these pages are meant, at all events, sooner or later, for the use of those to whom a pound is a large part of a year's income—you must in no case let the matter get into the hands of a lawyer. Find out the solicitor who bears the highest character in your neighbourhood.[1] Go to him. **Tell him precisely how things stand, and ask him to advise you as to what your exact legal position is.** You may be quite clear in your own mind that the claim cannot be enforced, but there may be some rule of law of which only a trained lawyer would be aware, which places you at the mercy of your adversary. The lawyer, if he is a sensible man, and if you are a sensible man, will be able to explain this to you. Our law is by no means perfect, and the way in which its rules have been formed has made it very hard to master them. But with few exceptions these rules are based on sound and intelligible grounds of common sense, justice, and convenience. Even rules which are found to

[1] See *ante*, p. 16, as to choice of a lawyer.

cause hardship now and then have been usually laid down because it was considered that without them far greater mischief would on the whole ensue.

Whilst the solicitor whom you consult is giving you his views as to your legal position, he will probably point out to you the course which had better be taken; whether you had better wait and try to make better terms, or settle at once, so as to save the expense of a County Court summons or writ, or resist the claim altogether. If, however, he does not tell you what you had better do, you must ask him what under the circumstances he would advise you to do. If he says "settle at once," you had better do so and have done with the business. If he says "wait," you had better wait. If he says "fight," ask him in what court the action would be brought, frankly explaining to him that if it will be brought in the County Court you would not mind, as you would attend to the case yourself; but that if the action were brought in the High Court, the question of expense would be a serious question for you. **Take care that you are quite open on this point, because a full**

**explanation of your position will no doubt influence him in forming an opinion as to the course you should pursue.** And you must also take care that at this stage, at all events, the conduct of the matter is not left in his hands. Thank him for his advice, and **ask him what his fee is, and pay it there and then.** It should properly be 6s. 8d., unless he has given your case much time and attention, in which case it would be 13s. 4d. My own experience of lawyers' bills has been that the charges made by solicitors of respectability are in themselves very reasonable. The totals, however, become large in consequence of a number of needless attendances and letters.

In the course of your interview, your adviser, if competent and sensible, will have told you much that will guide you as to what you should do, and as to what you should not do. If he tells you to wait, you will, of course, wait until the other side takes some further step. Be sure to ask him whether, if the dispute is to be fought out, it can be tried in the County Court; for the most faulty part of our system is that the judges of the County Courts are not allowed to try claims for more than

a certain amount, unless both parties consent that they shall be so tried.[1] There is, perhaps, no reform in our law which will give more relief to honest citizens than a provision that every action of whatever kind shall be begun in the County Court, and shall be continued and ended there, unless it can be shown that it really involves matters or points of law which make it desirable it should be tried in the first instance before a judge of the High Court. If your solicitor says that the action is one which cannot be tried in the County Court unless both parties consent, ask him whether you had better not write to your opponent to suggest that the case should be tried in the County Court. He will probably advise you to do so. If not, ask him his reason; for although, as a rule, it is in every way better that a dispute should be settled on the spot, there may possibly be good reasons

[1] The regulations now in force as to jurisdiction are both arbitrary and complicated. There is nothing to prevent a man from sueing you in the Supreme Court for 6d. If he does so, where he claims £5 and under as damages for a wrong, or where he claims £20 or under for breach of contract, he may, even if he succeed, be deprived of his costs. *A statement is given in the Appendix of all the disputes and questions which can be settled in the County Court.*

why it should not, or, at all events, why you should not suggest that it should be tried there by consent. These reasons, however, you are entitled to know. Indeed, at every stage in litigation your solicitor ought to explain why he thinks any particular step or line of action should be taken. If he is a competent and sensible man he will do so. There is always good reason for every judicious step in a lawsuit, or negotiation with a view to prevent a lawsuit, and it can always, even where based upon some rather technical decision or rule of law, be made clear by an intelligent man speaking to another intelligent man.

Should your opponent serve you with a writ out of the Supreme Court you had better take it at once to your solicitor, unless you have quite made up your mind not to go on, in which case you must at once forward the amount of the claim indorsed on the writ and the amount also indorsed for costs to the solicitor, whose name and address you will find on the back of the writ. If, however, you really have decided not to go on, you will probably not wait for the writ. This, however, will depend upon the advice your solicitor has given you. If

he thinks that you had better not give in at once, it may be as well for you to show fight. It will cost very little to enter an appearance; and perhaps if you do so you may be able to settle for less than the claim. Before I leave this subject I should draw your attention to one point which it is important you should understand. Where the person who makes a claim against you lives at a distance, and the affair out of which the claim arises took place where he lives, he has the right to sue you in his own County Court. The question whether the transaction did take place where he lives is often one of much nicety, and has given occasion for some highly technical decisions. These, however, need not be discussed here. If you receive a summons from a County Court at a distance, you may assume that you must go there to defend it. If you win your expenses will be allowed; but if you lose you will, of course, lose them. This may be an important matter to have before you when you are considering the question whether you will contest the claim or not.

There is also another matter which you must take into consideration before you allow a County

Court summons to be taken out. Before a summons is issued out of the County Court the person who applies must first pay a fee of 1s. for every £1 he claims. If, therefore, the claim is for £15, and you have to submit after the action is begun, you will, of course, have to pay this fee of 15s. The time is, I trust, not far off when these unfair taxes upon the doing of justice will be entirely removed. At present they fall with cruel inequality upon the poor, and indeed they amount to a denial of justice to the great body of the people. Many of the reforms which more than forty years ago Bentham claimed for us we have got, but his claim that "justice shall be administered gratis," and that "all exactions of fees shall be illegal,"[1] still remains to be insisted upon by the people for whom courts and judges exist, and by whom courts and judges are maintained.

I am well aware that there are many ways in which an improper use might be made of this right. It was the serious defect in Bentham's mind and character that he never could realise the practical difficulties of applying principles which

[1] "Judicial Establishment." Works, Vol. IV., 309.

were sound. He knew nothing of men as they really are in every-day life. It probably never occurred to him to think that if our Courts were thus thrown open they would be used as debt-collecting agencies, often in the harshest and most unjust way. I doubt, however, whether they would be much more abused for this purpose than our County Courts are; and, at all events, they would be better to this extent, that the poor debtor would not have the additional burden of costs put upon his shoulders.

If you have quite decided to resist an exorbitant claim, take care to obtain the opinion of your solicitor as to offering what is fair before action. The plaintiff would not be entitled to any costs if you can prove that you have made such a tender. If you wait until he begins an action and then pay the sum you think fair into Court he will be entitled to costs up to that time.

## CHAPTER II.

### HOW TO RESIST AN UNFAIR CLAIM.

In the County Court—How to act on the Day of Trial—What your Witnesses can prove—Compelling the attendance of Witnesses—The County Court Officials—Undefended Cases—The Plaintiff's Case—Judges and Judges—What a competent Judge can do—The Plaintiff in the Box—Leading Questions—Cross-examination—Apparent False Swearing—How to put your Questions—The Defendant's Case—Defendant in the Box—His Witnesses The Judge's Summing-up—The Decision—How to act under Defeat—Applying for a Rehearing—Actions in the High Court—Personally-defended Cases.

For the purpose of this chapter I take it for granted that the following things have happened. You have made sure by consulting a respectable solicitor that you can successfully resist an unfair claim which has been made against you. You have got him to explain to you any difficult points in your case. Having told the other side finally and distinctly that you must resist it, an action has been brought against you in the County Court of the district in which you live.

The summons which you will receive will let you know where and when you are to appear, in order

that the question may be tried. You will, of course, have kept copies of all the letters you have written to the other side. You will also have preserved all the letters you have received from the other side. Either the plaintiff or yourself may, if either of you wish it, have the case tried by a jury; but unless either side require it the action is tried by the County Court judge himself. **This right to have a jury is very seldom claimed,**[1] **and, as a rule, it is not desirable to ask for one.** There is a very general impression that the County Court judges look upon a demand for a jury as a reflection upon themselves, and that when it is claimed they are consciously or unconsciously set against the person who claims it. In some instances this no doubt may be the case, and when this is the case, the judge, being a weak judge, can do distinct harm. For though it is true that the result of the action depends upon the verdict of the jury, the judge has to sum up the evidence after both sides have finished, and he can do so in a way which may seriously affect the minds and judgment of the jury. Then,

[1] Of 632,628 actions determined in the County Court in 1881 only 980 were tried with a jury. (Jud. Statistics, 1881.)

too, if at the trial by the judge alone, he decides against you, and you are sure he has wrongly decided, you can apply for a rehearing, as will be explained farther on. If the application is granted, you are entitled to have the second hearing before a jury; and, indeed, if the correctness of the decision as to the facts is disputed, the judge himself very often suggests that there should be a jury.

On the day of the trial you had better be at the place where the County Court is held at the hour of opening. Take care before you go to arrange in their proper order of date the copies of your own letters, and the original letters you have received from your opponent, or his solicitor, together with any other papers which relate to the matter in dispute. If there are any persons who can give material evidence in support of your defence, you will, of course, see them beforehand, and get each of them to do what you should yourself do—namely, to write out what he can prove. Bear in mind, however, that a witness can give evidence only of what he himself has done or seen relating to the matter in question. He cannot state what he has heard somebody else say, however important its

bearing may be on the dispute, unless it was an admismission by the plaintiff, or by some one acting for him in such a way as to make it clear that he had authority to make such an admission. Suppose, for instance, that you are in partnership with another person, and the action is against your firm. If your partner were to say to the third person, "Of course, we owe the money, but we only want time;" the person to whom this was said could state this as an admission against you. Or suppose you allow your wife to carry on the business of your shop in your absence, and an action is brought against you for goods supplied to you. If she were to say to a neighbour that the money was really owing, the other side could call the neighbour as a witness, and he could repeat this statement.[1] Or again, suppose you send your servant to sell your horse, and he warrants the horse as sound, what he said could be proved against you, for you have given him authority to act for you in selling the horse, and the person who dealt with him might fairly assume that he was authorised to warrant it sound. But if the servant on returning home meets the man to whom

[1] Clifford *v.* Burton, 1 Bing, 199.

he sold the horse, and says, "I've done you nicely, the horse you bought of me has navicular disease," this could not be given in evidence as an admission against you.[1] Whilst he was selling the horse he was properly authorised to make the statements which you might yourself have made. But his authority ceased with the sale.

I give these examples in order to show that as a broad general rule, you and your witnesses can speak only to what you yourselves have seen or done with respect to the matter in dispute — with this exception, that you may prove statements made by your opponent himself. Of course, you can repeat any statement you have made to the other side, in order to show that he has accepted your denial of any liability. But such statements have little weight, and had much better not be repeated unless they lead to something more material. I need scarcely say that you cannot give in evidence statements which you have made to third persons when your opponent was not present. This would be making evidence for yourself. It, is, however, much better to avoid

[1] Helyear *v.* Hawke, 5 Esp., 72.

repeating conversations unless they go to the very root of the matter, and if you are prudent this will never be the case; for you will never allow the terms of any but the most simple business to be settled by word of mouth. If you can get your witness to write or dictate to you what he has to say, take care to keep a copy of it. Be sure, however, to remind him that he will not be allowed to read the paper when he is in the witness-box, unless it is a memorandum made at the time when the occurrence took place or shortly afterwards. In that case he is entitled to refresh his memory by looking at it. This rule will be dealt with more at length in the chapter on witnesses.

It seldom happens that a witness who can say anything in your favour will refuse to come and give evidence. But should he happen to refuse, it is not likely that his evidence will prove of much use. But if his evidence should be really necessary, you should have him served with a notice to appear, which you can obtain at the County Court office.

The places in which the County Court sittings are held vary very much in size and in the accommodation they afford. But in all of them

there is a table under the raised seat on which the judge sits. Just below him sits the Registrar,[1] who is the chief official of the Court. He calls out the cases, puts the oath to the witnesses, and sees that things are properly done. Round the table sit the solicitors who act as advocates. Occasionally there will be amongst them a barrister or two in wig and gown. Behind them are seats for the parties and their witnesses. Take your place on one of these seats. Before you do so, see that any witnesses you mean to call are at hand.

The way in which the work is done varies very much in different County Courts. In some there is a printed list of all the cases, which is hung up. From this you will see how you stand. But you must not suppose that you will not soon be reached because you are low down. For most of the cases are not defended. The Registrar goes through this list, and disposes of the undefended cases, reserving the defended cases for the judge, who comes in later on. In some courts, however, the judge and Registrar sit at the same time in different rooms,

[1] Or his clerk; for very often the Registrar is occupied in dealing with undefended cases.

and as the Registrar goes through the list he sends the defended cases in to the judge.

When your case is called on, get up and say, "I am the defendant, your honour." Then sit down and be quiet. The plaintiff or his advocate will then state his case. You will, of course, listen attentively, but be sure you do not interfere with or interrupt him, even if he should say something which is not correct, or which is offensive to yourself. You have only to wait, and your turn will come. Properly speaking, your defence should be reserved until the plaintiff's case has been finished, and the evidence in support of it has been given. The work, however, is generally done in a County Court in a very rough-and-ready way, and some judges—when no solicitor appears for both or either of the parties—take the case at once into their own hands. But unless this is done with tact, good sense, and judgment, their doing so usually causes much delay and confusion. As a rule, it is far better that the defendant should say nothing, and should not be called upon to say anything until the plaintiff has come to the end of his case.

If, however, the judge should call upon you to say anything, you should be prepared to answer him. Do so in as few words as possible. If you are quite sure that any explanation you may make will not simplify or shorten matters, and had better be kept until your turn comes, you had better say so in some such words as these:—"If your Honour will kindly allow me, I would rather keep my explanation until the plaintiff's case is finished." Most of the County Court judges are very considerate. But some are not. Where the judge is up to his work and knows his duty, you will have little or no trouble. Where he is testy, overbearing, or fussy, your work will be much more difficult. He is, however, set there to assist the parties in the settlement of their disputes. You are entitled to his assistance, more especially as your defence is a just defence. If, instead of helping you, he thwarts you by unreasonable interference, ill-temper, and impatience, I deliberately advise you not to give way to him. In firm but respectful language make an immediate protest, and tell him what I have just told you. Even the County Court judge, though he is far too little subject to other control, is

subject to the control of public opinion. I want to impress this strongly upon the poor man who is forced to go to law, because I know how much hardship and injustice are caused through too readily giving in to the caprice or temper of the judge. The people are not sufficiently aware of their rights, and much too timid about claiming them when they ought to claim them. But, as I have said before, most of the judges are sincerely anxious that right should be done, and you will probably receive willing and kindly help from the judge. The only thing you have to fear is, lest you should be put out by too much readiness to help. Some well-intentioned County Court judges are fussy. It is, indeed, a failing which is not confined to judges of the humbler courts.

When the plaintiff's case has been stated his witnesses are called, unless things should have taken such a turn that it becomes unnecessary to prove anything. This is quite possible; for while the plaintiff or his solicitor is stating his case the judge, if he is an experienced and capable judge, will shorten it by getting all undisputed facts agreed to by both sides. The effect of this is often

very surprising. The husk of the case is stripped off, the shell cracked, and the kernel—if there is one—extracted. Sometimes, indeed, there is no kernel at all. The claim, as you try to grasp it, fades like a ghost into nothing. If there are still some facts in dispute the judge often finds that they do not bear upon the real question, and it is decided without any witnesses being called. If it should be your good fortune to go before a judge of this sort, you will find it both amusing and instructive to watch carefully the way in which he deals with the cases that come before your own. Indeed, it is the only pleasant side of a very dreary and sad scene in which a roomful of people who have fallen out have come to get their disputes settled. Most of the cases are no doubt small cases, claims for small sums or squabbles about trifling matters. But they are neither small nor trifling to those concerned. A good and kindly County Court judge always bears this in mind. To those who come before him a few shillings mean as much as scores of pounds to rich people, and he always remembers this. He never treats even the smallest case as not worth attention. Nor does he

allow his quick and trained wits to become impatient, because those who come before him are neither quick-witted nor intelligent. It is wonderful how, with a little pains and patience, he can make both sides to a squabble come to see the rights of it in a way they never could have seen it but for him.

I have much to say about the County Court, its work, and its judges, which I must not say here. But this I must say here. There is no work of any kind which it is more important to have done conscientiously and well than that of a County Court judge, for a County Court judge—in a large district particularly—has it in his power to do more good than any other official or person of any kind or in any station. On the other hand, he has it in his power to do infinite harm. Unless he is filled with a deep and abiding sense of duty, which makes him patient, forbearing, always ready to make allowance for ignorance and inexperience, there is no knowing what injustice he may not do or what suffering he may not cause amongst the humble folk whose interests are confided to him and who come to him for help. I am the last person to undervalue those fine qualities of mind which can

ground the simplest act of justice upon some rule of law built up by the wise judgments of our great judges and law-makers. It is no doubt most desirable that a County Court judge should be a good lawyer, so long as he is not a mere lawyer. But it is far more important that he should be a man of good common sense and good feeling. There is "no nation whose laws have such features of excellence in them as those of England,"[1] and when we come to examine them carefully, all that is good in them is the perfection of common sense and right feeling. I venture to say that there are few, if any, of the leading cases in our law on which, if the facts were clearly laid before an educated and intelligent man, he would not have given a right judgment. At all events, for the rough-and-ready practical work of settling disputes in a County Court, common sense and right feeling are the most essential qualifications.

If it appears that there are material facts as to which both sides are not agreed, the course things will take will to some extent depend on whether the plaintiff's case is managed by a lawyer or not.

[1] Bentham, IV., 314.

If he has a lawyer, and the plaintiff—as is usually the case—is the chief witness, the plaintiff goes into the box. When he is sworn, his solicitor asks him questions with the view of getting him to tell his story, so as to confirm the solicitor's opening statement. Here you ought to receive important assistance from the judge. If he is competent and conscientious, he will take care that the solicitor keeps straight and does not put questions which ought not to be put, particularly questions known to lawyers as "leading questions." If you have had the chance of watching some cases before yours has come on, and if either solicitors or barristers have been opposed to each other in these cases, you will probably have noticed that when one of them has been examining a witness the other has constantly got up and objected that his "learned friend" is "leading" the witness. This is generally followed by a wrangle. I will only here explain that leading questions are questions which directly suggest to the person to whom they are put the answer he is to give. Such questions when they refer to a material fact in the case are obviously not fair questions, and are

not allowed. But, of course, you must not try to stop such questions. Leave that to the judge. If he does not object, be sure that you will only do mischief by objecting. You will remember that the witnesses on the other side can only, like yourself and your witnesses, state facts which are within their own personal knowledge, that they cannot give the contents of written papers, or repeat what they have heard other persons say, with the exceptions I have already explained in my hints about your own evidence. If he tried to do any of these things it would, of course, be the duty of the judge to stop him, and he would be pretty sure to do so.

It is therefore very unlikely that there will be any occasion for your interrupting a witness. But if by any chance you should have any real objection to make, take care that you make it to the judge. Do not under any circumstances address yourself either to the witness or the solicitor who appears for him.

When each witness for the other side has told his story, you have a right to put questions to him. The object of such questions is, of course,

to make him contradict what he has already said, or add something which will make his evidence square with your defence. This is called cross-examination. There is nothing more difficult than to cross-examine a witness so as to help your own case, even when it is a good one. Advocates who have some experience, sharpness, and assurance, can often make an honest witness look foolish by browbeating him. But this is not effective cross-examination, though it frequently gains an advocate a reputation for ability. Effective cross-examination is the art of getting from a hostile witness statements or admissions which either do not agree with or which explain away what he has already sworn against you. To do this is a very difficult thing, whether the witness is speaking the truth or not. So difficult is it, so rare is the possession of the subtle power which makes it possible to do this, that cross-examination even by skilful and practised advocates generally does more harm than good.

Do not, therefore, attempt to cross-examine a witness at all unless you are sure from your own knowledge of the facts that what the witness is

saying is untrue, and you are prepared to contradict him either yourself or by other witnesses. When I use the words "saying what is untrue," I, of course, mean untrue as to some important fact. You must be prepared to find that those who are called as witnesses against you will give an account of what took place which does not by any means entirely agree with your notion of what took place. They will try to state all the facts which make against you as strongly as possible. They will try to keep back facts which tell in your favour, or slur them over. And, no doubt, if you had to state what took place, you would have made the case look somewhat different. But remember that the judge, who is, or ought to be, taking down what is said, is listening to everything, and watching everything with keen and impartial attention. He has had long experience, and he probably is a sensible man. He will make due allowance for all these disturbing influences, as well as for the inexactness which is often found in the evidence of the most conscientious men. If, however, there is something which ought to be cleared up, he will himself generally put a few judicious questions before the

witness leaves the box. Unless, therefore, some statement has been made on oath, which is not only untrue, but if uncontradicted will tell seriously against you, do not ask a single question. Merely bow to the judge, and say, "I have nothing to ask the witness, your Honour;" you may be sure that on hearing this the judge, if there is anything which needs explanation, will get things put straight, unless he has done it already.

Should you think it absolutely necessary to cross-examine a witness, do it very quietly and civilly. It is quite possible that what seems a deliberate falsehood may not be a falsehood at all. You may not have understood the witness. Or he may have been honestly mistaken. It is even possible that he may have persuaded himself that he saw what he says he saw, though really he never saw it, or that he did what he said he did, though he did not do it at all. Even in the last case he may not be wilfully lying. Take a not impossible instance. A man thinks that the editor of a paper has written something very unfair and unwarrantable about him. He drives up to the office of the paper. As he gets out of the cab the editor comes

up. He, of course, knows that the man has come with no friendly object. The first words addressed to him are words of anger. A fight takes place almost directly. The editor summons the other for an assault. The question on which the whole matter turns is, "Who struck the first blow?" Now it is quite possible that each honestly believes the other struck the first blow. There is an altercation, sharp and short. The presumption, of course, is that the aggrieved man is the first to strike a blow. Yet in these few seconds of passion on one side, and apprehension on the other, it may well have been that the editor took a mere gesture for an attack, and met an imagined with a real assault. So that it is quite possible a man may conscientiously state that he believes a certain thing to be done, which, however, may afterwards be proved to be the very reverse.

You are, therefore, not justified in taking it for granted that because a witness states what you firmly believe not to be the fact, he is wilfully swearing falsely. For this reason, if for no other, you must not let it be supposed from your tone and manner that the witness is not to be believed.

Here, however, as in every other case, what is right and what is expedient go together. Your best chance of bringing out the truth will be by assuming that the witness wishes to tell the truth. Be courteous, and put your questions as if you were asking for information. Take care not to come at once to the statement which you believe to be, we will not say untrue, but incorrect. Bring him up to it in such a way as to make it possible for him, on reflection, to qualify it. Your own common sense will tell you that no possible good can be done by putting back into his mouth words he has already uttered. If you are prepared, either yourself or by others, to prove that words were spoken in the hearing of the witness which contradict, or are inconsistent with, his evidence, put them to him distinctly. But do it, if possible, with a suggestion that they may possibly have escaped his memory. For instance, you have refused to keep some things which you had ordered, because they were not sent home at the time you bargained for. The plaintiff has said nothing about this; you must take care to put it to him; but you can put it in this inoffensive way:—"When I ordered the

goods, Mr. ——, do you remember my mentioning Thursday?" He will probably say, "No, I don't." Then you can go on:—"Now, try to recollect. Do you not remember my saying when I ordered the goods, that they were wanted for the following Thursday evening, and must be sent home not later than three o'clock on that day?"

If some one else was present who can confirm your statement, you should begin by getting him on the scene. "When I ordered the goods Mr. So-and-so was present, was he not?"

It is, of course, quite impossible to do more than show very generally how you are to manage this business of asking questions. But I think I have said enough to make it clear that the less you try to cross-examine, the better it will be for your case.

It is just possible that the plaintiff will fail to make out any legal claim. If so, the judge will no doubt say so, and will give judgment, or where the action is tried before a jury, direct the jury to find a verdict for you, the defendant. There is then an end of the case, unless the judge expressly says the contrary, and you get your costs. You are, of

course, entitled to ask the judge whether he thinks there is any case. But it is very unlikely that the judge will have failed to notice that the claim has not been made out. If, therefore, he says nothing, you had better say nothing, but get up and state your reasons for resisting the claim. They will probably have become evident as the plaintiff's case goes on. Unless there is really something which you think it desirable to explain, and if you are the chief witness, you had better confine your statement to saying, "Perhaps, your Honour, it will save time if I go into the box and give my evidence." Indeed, it is very likely that the judge will himself say, "Well, Mr. —— (meaning you), on what ground do you resist the claim?" or, "I think, Mr. ——, you had better go into the box and give us your version."

Whatever you do, avoid being long-winded and rambling. If you have to make a statement or an explanation, stick to the point and be brief. Avoid as much as possible any expression of feeling. The quieter you are the more effective you will certainly be. Take care that you do not state anything which you are not prepared to prove, either yourself

or by some witness you are going to call. When you are giving your evidence, state shortly and exactly all the facts within your own actual knowledge, including, of course, anything said by the plaintiff, or by any one who acted as his agent in the matter. Confine yourself to these facts, and state them in their proper order. Carefully avoid expressions of mere opinion. Be sure not to repeat what anybody outside of the case may have said, unless it was said about the matter in dispute in the hearing of the plaintiff, so that he could—and should—have objected if he did not admit the correctness of what was said. Take care to have ready in your hand, and in their proper order, any letters or papers which you may have to refer to or read. But do not keep them in your hand. Put them down on the table or ledge before you when you begin your evidence. If you do not, and the plaintiff's case is conducted by an advocate, he will probably try to put you out by asking you sharply, "What is that you have in your hand?" When you have read any letter or paper, you had better hand it to the officer of the court if you wish it to be part of the evidence. The judge, however, will

always see that you are not placed at any disadvantage through not observing the technical rules as to putting in or proving writings.

Whether the plaintiff himself conducts his own case or employs an advocate, you will certainly be interrupted. Be prepared for this. Don't get flurried, and, above all things, don't lose your temper. Wait until the person interrupting you stops; then go on with your story without noticing the interruption, unless it becomes absolutely necessary to do so. For instance, the plaintiff's advocate may object to something you are about to say. When he does so, stop at once. Wait till he has made his objection. His objection ought to be addressed to the judge, not to you. When he has finished, turn to the judge for his direction as to whether the objection is a good one or not. You will, of course, cheerfully accept his decision if it is against you. It will probably be right; but if wrong, you will only do harm by arguing with him.

I need scarcely warn you to have no reserve, to be perfectly frank, to keep back nothing which may appear to make against you if it really has any

bearing on the case. Where the defence is an honest defence, made against an unfair or unreasonable claim, as every case must be for which these "Hints" are written, keeping back anything is, of course, not to be thought of. It seldom, if ever, helps a bad case. It certainly never helps a good case. What is kept back is pretty sure to come out in cross-examination, and makes a much worse impression than if it were told at once. When you have given your evidence, the plaintiff or his advocate will, no doubt, put questions to you in cross-examination. If the case is conducted by an advocate, he will perhaps try to browbeat you. In the chapter on witnesses, you will find my hints on this subject. I will, therefore, not repeat them here; but be sure you read them attentively.

After you have given your evidence, you will call any witness or witnesses you may have in support of your defence. I need here only tell you that our rules about examining witnesses are in the main what good sense would suggest. You can ask your witness questions which will lead him up to the point at which he has something to say directly bearing upon the dispute. Here he should

be left to tell his own story. No suggestions should be made to him as to what he shall say. All this sounds very sensible, very fair, and very simple. It is, however, by no means so easy as it seems to follow these simple rules in practice. I would, therefore, advise you to ask him no questions at all, but merely to say, "Now, Mr. So-and-so, will you kindly tell his Honour what you know about this matter?" The judge will generally take him in hand and get out all that is material. But you must follow carefully all that is said, for it is just possible that some very important bit of evidence may not be extracted. If this should be the case, you must wait patiently. Don't interrupt or interfere with the judge. They don't like it as a rule. Nobody likes it. When you see that he has quite done, you can say to the witness, "There is just one thing I should like to ask," and then bring to his mind something—a date, a day—which will recall what you want him to speak to. Here your opponent, if he is a lawyer, will probably object that you are leading the witness. To make this objection is considered the right thing by those who wish to appear sharp, whether there is anything in

the objection or not. If he does object, wait until the judge expresses his opinion. If he is worth anything, he will see what you are driving at, and get the witness to say what has been omitted. After all your witnesses have been called and given their evidence, you are entitled to make any remarks you may think necessary. Unless there is some point of importance to which you wish to direct particular attention, you had much better say no more than "That is my defence, your Honour." It may be that the judge will at this stage, in a conversational manner, and addressing both sides, express his view as to the rights of the matter, and this generally ends the case. But, strictly speaking, if you have called witnesses, your adversary, or his advocate, has the last word, and then the judge, if the case is tried by himself, gives judgment.

When the action is tried before a jury, the judge sums up the evidence; that is, he recalls to their attention the principal facts given in evidence on both sides, explaining to them, where he thinks it necessary, the legal effect of the evidence. To you who are fully and accurately informed on all the small details of the case, he will seem sometimes to

make a mistake here and there as to the exact words spoken, and so on. Never mind this. Unless the mistake is a serious mistake, don't try to correct him. It puts even good judges out, and, if they are inferior men, sets them against you. Upon this point you cannot exercise too much self-control ; for it is very difficult, when engaged in a case where one is much interested, to form at the moment a just judgment as to the bearing and importance of particular facts. It is, indeed, the chief defect in all inferior advocates that they are always wasting the time and patience of the judge on trivial points of this sort.

Where the judgment or verdict is in your favour, the rest of the business is mere routine, and will be done by the Registrar of the Court or his clerk.

I have taken it for granted that you have defended the action because you feel quite sure that the claim was not a just or reasonable claim. Nevertheless, you must be prepared for an adverse decision, and you must also be prepared to submit to it. Your witnesses may have failed, or they may have given evidence which did not sufficiently

support your defence. The first impulse, even with the professional advocate, is to rebel against an adverse decision; much more is this the case with the person who himself suffers. Resist this impulse. Say nothing at the moment; not only if you think that the judge has been free from prejudice, but even if you think he has been unfairly biassed against you. Go home. Think the matter over quietly. If possible, talk it over with some sensible and judicious friend. If after doing this you still feel convinced that the decision is wrong, go and see your solicitor. Tell him as exactly as possible what took place at the trial. Then ask him whether under the circumstances he thinks you had better apply for a rehearing. He will probably know much better than you do the character of the judge, and unless he is very decided in his opinion that you should apply for a rehearing, you had better accept and make the best of your defeat. Should he be distinctly in favour of your trying again, you must attend at the next County Court sitting, and apply to the judge for a fresh trial. Perhaps, on the whole, it will be as well that the application should be made by your solicitor, as it

would come with much greater weight from him. But you need employ him only to make the application, for which he will probably charge a guinea. Make sure about this. If he is a sensible as well as an honourable man, he will not resent your asking him what his fee will be. You had better be guided by him as to whether, if the application is granted, you should demand a jury. As I have already pointed out, the advisability of asking for a jury will depend much upon the character of the judge; and on this point your solicitor will probably be better able to form an opinion than yourself. Where the judge—as is the case with most of them—is not only conscientious and painstaking, but open to conviction, he had better be asked to rehear the case. Where he is prejudiced and perverse, a jury should be asked for, if he does not suggest a jury; and when your case is retried, you must not be afraid of the judge.

It may be that at the first trial the judge has decided against you on some point of law. Against this decision you may, under some circumstances, appeal to the Supreme Court. But I need not go into this branch of the subject. The probability

is that he is right, or that if wrong his mistake does not really affect his decision. Here you must distrust your own judgment. If it seems, however, that he is clearly wrong on a point which really affects his decision, you must again go to your solicitor. It is most likely that he will see some good legal reason for the judge's decision, which you, from your want of legal knowledge, have failed to understand. It may not be what you consider justice, but it is well to remember what I have already pointed out, that there are rules of law which in the main work well, though here and there they cause hardship. These rules the judge is bound to follow.

If your solicitor thinks the decision of the judge on the law of the case is only open to question, you will not, if you are wise, try to dispute it. If he is quite sure that the judge is wrong, and you have the money to spare, it may be worth your while to appeal. But remember this: if you appeal you must be out of pocket as to costs even if you win. Should you decide to appeal, you must put the matter in the hands of your solicitor, where I now leave it.

It will be observed that in all I have hitherto said I have supposed that you are resisting a claim made in the County Court. But as I have already remarked, the County Court can deal with claims only for sums of limited amount. If, therefore, the claim against you is such as cannot be tried by the County Court, you will, of course, be sued in the High Court. Now there is nothing to prevent you from defending yourself against an action brought in the High Court. We have lately had one or two cases which have excited great interest when one of the parties has defended the action and conducted the whole case in person. In one instance, indeed—that of Mr. Bradlaugh—the most important and difficult questions of law were argued with skill and ability which drew words of the highest praise from some of our most eminent judges. These, however, are not common cases. An ordinary person who has had no legal training and experience will find great difficulty in either bringing or defending an action in the High Court, even with our new and in some respects more simple forms.

If, however, it is an action which you must

resist, and you are not able to employ a solicitor, you must, of course, do the best you can. On receiving the writ, you must go to a solicitor and get him to enter an appearance;[1] then you must consult him in exactly the same way as I have advised you to do in defending an action in the County Court, the only difference being that here he will probably have to draw up for you a written statement of your defence. If you find that the action is to be tried at a distance from where you live, and you have witnesses living near you, you should, if possible, get the action tried at the Assizes in your own county. I really think that I should rather confuse than help you by trying to give you any more precise instructions than these. I will only add that if you have to defend such an action yourself you will have to spend most of your time in working out all the steps to be taken. If, on the other hand, you have means and can employ a solicitor, you must be prepared for much worry and anxiety, as well as for the absolute

[1] Unless you live in or near London, or at or near a town where there is a district registry of the Supreme Court, in either of which cases you can enter an appearance yourself.

certainty that even if you win you will be out of pocket as regards costs.

My advice as to what you are to do at the trial of an action in the County Court equally applies to a trial in the High Court. Most of the judges of the High Court are even more considerate and painstaking than the County Court judges when a man conducts his own case. But they are far more hampered by rules of practice, and very often cannot bring themselves to relax them in your favour.

## CHAPTER III.

### HOW TO ASSERT A JUST CLAIM.

How to act when you are the Plaintiff—Personal Considerations—Procedure in the County Court—High Court Difficulties—Aim at a reasonable Settlement.

This will be a very short chapter. My hints for avoiding litigation apply quite as much to a case in which you are making a just claim, as to a case in which you are resisting an unfair claim. If, therefore, you have a claim against anybody which you think is a just claim, you had better read the chapter (Chap. II.) containing those hints. Be guided especially by what it says as to your making quite sure that you are right. Be on your guard against thinking too much of what you may be strictly entitled to. You may well be entitled to all that you claim, and yet it may be very hard upon the other side if you exact it. Try to put yourself in the place of the person against whom you have the claim, and be ready to make allowances. Whilst

insisting upon your full legal rights, show readiness to settle upon reasonable terms. Above all things, avoid doing, saying, or writing anything which may irritate or annoy the person against whom the claim is made by making him feel unpleasantly conscious that you have him in your power. Want of delicacy and consideration does more than anything else to bring about lawsuits. If you can do no good with your adversary by these fair means, then if you are sure of success, carefully read what I say in the first chapter (*pp.* 45, 47) as to the way in which the action must be brought. Should you be able to bring it in the County Court, then read Chapter II., and, placing yourself in the position of plaintiff, you will understand what you will have to do in order to enforce your claim after you have begun your action.

In order to do this, you must go to the County Court office, taking with you any letters, papers, and memoranda. The Registrar's Clerk will take your instructions, and will also require you to pay a fee of one shilling for every pound you may claim. He will then give you a note, which you must take care to keep, and have with you whenever you have

occasion to go there again, as well as when you attend at the hearing. The defendant will be served by the officer of the County Court with the summons containing short particulars of your claim. As to any other steps to be taken before the hearing, including request for a jury, summons to witnesses, and so on, you will obtain all necessary information at the Registrar's Office, where, as a rule, the clerks are most obliging.

If your claim is one which cannot be tried in the County Court, and you are unable to obtain the consent[1] of the other side to have it tried there, you must, of course, begin it in the High Court. I have already explained how difficult it is for any one who is not a lawyer to carry on a lawsuit in the High Court, and at the same time given, so far as is possible in such a little work as this, hints as to how you are to set about it.[2] I will only add that after the action is begun you should do all you possibly can to have the matter settled on reasonable terms ; bearing in mind, of course, what I have already said as to your writing or saying nothing which may be used against you.[3]

[1] *Ante*, p. 47. [2] *Ante*, p. 86. [3] *Ante*, p. 14.

## CHAPTER IV.

### HINTS TO WITNESSES.

How you may come to be a Witness—Caution as to witnessing of Signatures—The witnessing of a Will—Hints to Accidental Witnesses—Prudence of making a Memorandum of Facts and the Like—Compulsory attendance as a Witness—The Subpœna—Rate of Expenses—Penalties for neglecting the Subpœna—Minor and Grave Offences—Witnessing on Summons or under a Warrant—Scale of Expenses for Professional and Ordinary Witnesses—Hardship of the System—Taking down your Evidence—Hints about Depositions—What to do when your Case comes on—In the Witness-box—Taking the Oath—Examination-in-Chief—Leading Questions—Cross-Examination—Browbeating—Attempts to Discredit—Conflicting Evidence—Re-Examination—Production of Writings—Notices to Produce.

It may happen that either willingly or against your will you become witness of a fact which proves to be material in a dispute, or in a criminal charge. You may be asked by a neighbour to witness a will, and the will may be disputed. You may be, by chance, at hand when an assault or robbery is committed, or when a carriage accident happens in the street. When you become of your own free

will a witness to any fact, you are morally bound to state, if necessary, what you believe to be the fact. You should, therefore, be careful that you do not needlessly or heedlessly put yourself in this position. Never witness a signature to any writing by any one, unless you know him pretty well. In every such case take care to see before you sign it that there are words above where you are going to sign your name which show that you are signing only as a witness. The usual words are, "Signed," or "Signed, sealed, and delivered in the presence of;" though only the word "Witness" is sometimes put, and is sufficient except in the case of deeds. If you sign your name under such words, there is no risk of your finding that you have put your name to anything which makes you personally liable. The person who asks you to witness his signature will generally tell you what it is—an agreement, or a lease. But if you know him sufficiently well to agree to be a witness, and you take the precautions I have advised, it is not at all necessary that you should know what the writing is about. If the man is a chance acquaintance, or one whom you distrust,

you are quite justified in saying that you never become a witness except for intimate friends.

When you are asked to witness a will, or a codicil to a will, remember that it must also be witnessed by another person besides yourself; that he and you must both be present when the person making the will signs it; that the person whose will it is should distinctly ask you both to witness it as his will or codicil; and that you must both sign your names as witnesses in his presence, as well as in the presence of each other. It is always well to make an independent memorandum that you witnessed so-and-so's will on that particular day. When you sign your name as a witness to the signature of somebody else, you, of course, can only witness the fact that he signed his name to a particular writing. You are not in ordinary cases expected to know what the writing was about. But when you become a witness to a will you are obliged to know that the person whose signature you are witnessing is making his will. He should ask you to witness it *as his will or codicil.*[1] You

[1] An actual request by the testator is, however, not strictly necessary. Inglesant *v.* Inglesant, L. R. 3 P. & D., 172.

are told by him that he is signing an important writing, which deals with the property he will leave behind him at his death. Now we all know that wills lead to more differences and lawsuits than almost anything in human affairs. Those whose hopes of getting something have been disappointed are only too ready to persuade themselves that there has been something wrong. Either some one has been unfairly influencing the dead man, or his mind had become affected. Where, therefore, you have reason to think that there will be disputes about a will, avoid becoming a witness to its signature if you can fairly do so. There may, of course, be cases in which it would be wrong to refuse on this ground. You may have reason to suppose that the will of a person who has asked you to witness it will be disputed, on the ground that there has been undue influence or mental incapacity. If you are sure that there is no foundation for so disputing it, and you know that no one else can be got whose evidence would be so strong and independent as yours, then you should set aside all thought of your own convenience, and become a witness. Fortunately, such cases very

seldom occur; but whenever they do, a memorandum of all the circumstances should be made at once. Such a memorandum will be of great use if the will should be disputed, for you will be able to refer to it when called as a witness.[1]

It is a difficult question of duty how far one is bound to come forward when one has accidentally become witness of facts which bear on a dispute. If it were quite clear that injustice would be done unless the evidence were given, it would no doubt be wrong not to come forward. But it seldom is clear. Very often, indeed, a casual observer feels doubtful as to what he has seen, and still more doubtful whether what he has seen will throw much, or any, light upon the matter. On the whole, therefore, unless you are quite sure as to what you saw or heard, and unless you are also quite sure that real injustice will be done if you do not come forward, you may keep out of the fray with a clear conscience.

If you do make up your mind to come forward, you should let the person in whose favour your evidence will tell know what you have got to say.

[1] See next page.

For the reasons which you will find stated farther on you will, however—unless you have complete confidence in his good faith—only let him know this generally in the first instance. In every case where facts occur within your observation, or words come to your ears which you think may become the subject of a lawsuit or a criminal charge, you will do well at the first possible moment to write down what you saw or heard. Apart from its value as a record, you can take it into the witness-box and read it; for practically that is what the law on the subject amounts to. Though it is on all accounts desirable that the entry or memorandum should be made as soon as possible, the maxim, "Better late than never," applies here. It is true that in one case a witness was not allowed to refer to notes which he had prepared *some weeks* after the transaction had occurred.[1] But if you are "prepared to swear positively that the notes were taken down at a time when" you "had a distinct recollection of the facts there

[1] R. *v.* Sir A. Gordon Kinloch, 25 How, St. Trials, 934—937. R. *v.* Horne Tooke, cited 25 How, St. Tr., 936. Burrough *v.* Martin, 2 Camp., 112. Smith *v.* Morgan, 2 M. & Rob., 257. Wood *v.* Cooper, 1 Car. & Kir., 645.

narrated," you will in general be allowed to use them, though they were drawn up a considerable time after the transaction had occurred.[1] You will, of course, produce the original memorandum. If, however, it has been lost, or mislaid, or destroyed, and you have a copy of it, there is little doubt you would be allowed to use it.[2] It is important to bear in mind that any such memorandum has one great advantage. If you are quite sure you made it when the transaction was fresh in your memory, it does not matter that you have quite forgotten all or any part of the facts.[3] You are very properly allowed to say that though the facts have now faded from your memory, you are quite sure you set them down correctly in the memorandum. There is only one other thing I need say

[1] Taylor on Evidence, 1218, citing R. *v.* Sir A. Gordon Kinloch *ubi supra*, and Wood *v.* Cooper, 1 Car. & K., 646, per Pollock, C.B. I have not dealt with the question—"What are original memoranda, and what are copies?" as to which there is much confused comment on a number of decisions, in the work I have just cited. The practical effect of the decisions is the advice given above, so far as this branch of evidence is concerned.

[2] Burton *v.* Plummer, 2 A. & E., 344. Jones *v.* Stroud, 2 C. & P., 196. It seems very doubtful whether a copy can be used if the original is in existence, unless it has been mislaid.

[3] R. *v.* St. Martin's Leicester, 2 A. & E., 210.

as to these notes. They do not become evidence themselves because you produce and read them.[1] But the person against whom your evidence is given, or his advocate, has a right to look at them. You must hand the memorandum to him if he asks for it, and he may put questions to you about its contents.[2]

You can be compelled to attend and give evidence in any lawsuit or criminal inquiry by any of the persons directly concerned in the matter; by the plaintiff or defendant if it is a lawsuit, by the prosecutor or the accused if it is a criminal charge. As the law on this subject is different in the case of criminal inquiries and trials from the law in civil trials or lawsuits, I will deal with lawsuits first.

You can only be compelled to give evidence in a lawsuit by receiving a notice to attend, which is a copy of what is called a subpœna.[3] This is

[1] Alcock *v.* Royal Exch. Insurance Co., 13 Q. B., 292.

[2] Sinclair *v.* Stevenson, 1 C & P., 582.

[3] "There is no common law obligation on any person to give evidence on the part of another. The duty is created by the service of a writ of subpœna, and by that means only." (Lush., Common Law Practice, p. 524.) Even when a person whose evidence is required is in court, he may refuse to be sworn unless he has been subpœnaed. Bowles *v.* Johnson, 1, W. Blackstone, 36.

obtained in the Court in which the proceedings are going on. When the copy of the notice is served upon you, the original subpœna should be shown to you, and a sum of money should be actually offered to you, which will be sufficient to pay your reasonable expenses in going to, staying at, and returning from the place of trial.[1] The amount allowed for these expenses will depend upon what you are. If you are a mechanic, you may fairly require that you should be paid second-class fare to and from the place of trial, and 5s. a day for living expenses. If you are a clerk, you ought to have first-class fare and 10s. a day for living expenses; if you are a merchant or professional man, or a person of means, you ought to have first-class fare and £1 a day. You can claim nothing as compensation for loss of time and earnings, whatever your condition or occupation may be.[2] But when a lawsuit is ended, the officer of the court who passes the bill of costs is directed to make an allowance according to a fixed scale to

[1] Ashton *v.* Haigh, 2 Ch., 201. Fuller *v.* Prentice, 1 H. Bl., 49.

[2] Not even where there has been an express promise to pay it, Collins *v.* Godefroy, 1 B. & Ad., 950.

the witnesses, in addition to their expenses actually paid.[1]

If for any reason you have come to the place of trial without having received your expenses, you may refuse to give your evidence until they are paid. Any one, however, who reads these pages ought never to be in this position unless he is quite sure that he will be paid.[2] If he does, he should take care to let it be known that he must have his expenses before he is called, so as to avoid the unpleasantness of having to refuse publicly when he has been sworn. If you live in the town in which the trial is to take place, you are not entitled to require any payment for expenses.[3]

It is stated in the books of practice that you are

[1] There seems to be no doubt that where on taxation this allowance has been paid to the litigant or his solicitor, the witness can compel him by action to pay it over to him. Lush., Common Law Practice, p. 526.

[2] Where a witness does refuse to give, and does not, in fact, give evidence, because his expenses are not paid, he may still compel the person who subpœnaed him to pay them. Pell *v.* Daubeny, 5 Exch., 955.

[3] It is customary to offer a shilling to a witness living in London when the action is to be tried in London, but this is not necessary in ordinary cases. Jacob *v.* Hungate, 3 D.P.C., 456.

not bound to attend unless the subpœna has been served upon you a reasonable time before the trial. This sounds only fair. But take care that you are not misled by the date on the notice. The assizes may be going on at the county town thirty miles off, when a man comes to your house with a paper in which you are told "to set aside all things and cease every excuse," and appear at the county town at ten o'clock in the forenoon of the day before yesterday, to testify the truth, according to your knowledge, in a certain action between John Jones, plaintiff, and Thomas Rowe, defendant; and you are also told that "this you shall in no wise omit, under the penalty of £100." Now on the face of it this is scarcely giving you notice a reasonable time before the trial. Nevertheless, if the man tells you that the action has not been tried, post off at once;[1] for the subpœna bears date the day on which the Assizes begin, and they may last for many days. Whenever, then, you are served with a subpœna to attend as a witness, and have received such a reasonable sum as I have already described for your travelling and living expenses, you had better

[1] Dacres *v.* Lovell, 7 D.P.C., 178.

attend on the day mentioned in the notice; or if that day is passed, as soon as you can get there, unless you receive written instructions to the contrary from the solicitor who conducts the case for the person in whose favour you are to give evidence. Note that I say *written* instructions. The course of business at sittings for trying actions, whether at Assizes or in the County Court, is so uncertain that, as a rule, it is quite impossible to say when a case will be called on. The solicitor may think and say that it cannot be reached before a certain time. But he may not be aware that a number of cases which come before him will not be defended or will be settled.

It is, of course, the duty of every citizen to "testify the truth according to his knowledge," in any proceedings where that testimony really has a distinct bearing upon the question to be tried. But it may be that you have been subpœnaed where you have nothing material to say, and feel that you are being dragged at great inconvenience, and possibly at great loss, away from your home and business. Still, you had better submit, for it is possible, though not probable, that the consequences of your non-

appearance may be serious. In the first place, your non-appearance is a contempt of the court which has caused you to be summoned, for which you may be punished by fine and imprisonment. It is true that the court will not inflict the punishment unless on proof of all the requirements of service having been strictly complied with, and so on, that you were not present when duly called, and that you were a material and necessary witness.[1] But a disappointed litigant might put you to serious annoyance and expense by moving for what is called an attachment, though he failed to get you fined or imprisoned. And if he could not get you fined and imprisoned for contempt of court, he might worry you with an action, though in the action he could not recover damages unless he showed that he had a good cause of action,[2] and that you were a material and necessary witness.[3] It may happen that you hold some letters, documents, or writings, and that one side or the other consider it important that they should be produced. In that case you will receive a notice to attend at the trial and produce them. If so, you

[1] Taylor *v.* Willans, 4 M. & P., 59.

[2] Mullett *v.* Hunt, 1 C. & M., 758. [3] Lush., Practice, p. 533.

must take them, though you may have good reasons for objecting to produce them.[1] You can make your objection to produce them when you are called, and the judge, if it is a proper objection, will allow it. Even if he does allow it, you are still entitled to your expenses as a witness.

When an offence has been committed which renders the offender liable to punishment either by fine or imprisonment, the supposed offender must in every instance be summoned or taken[2] before the justice of the district (called a Petty Sessional division) or borough, in which the offence has been committed.[3]

Offences may be broadly divided into "minor offences," which the justices have power to hear and decide at once, and grave offences, which they

[1] Not obeying such a subpœna is, unless explained, a contempt of court. Amey *v.* Long, 9 East, 472. Corsen *v.* Dubois, Holt, 239.

[2] He is "summoned" where the offence is of a minor character. He is "taken" where the offence is of a grave character, in which case he may be arrested with—or sometimes without—a warrant, issued by a justice. He may also be arrested under a warrant if he disobey a summons.

[3] Where there are paid magistrates, such as the police magistrates in London, or the stipendiary magistrates in certain large towns, he is taken before them.

can only inquire into so far as to decide whether the accused ought to be put upon his trial before a jury. If they think there are good grounds for a trial by a jury, they commit him for trial either at the Quarter Sessions or at the Assizes.[1] If not, they dismiss the case.

It is considered by our law to be the public duty of every citizen to give evidence which will tend to bring offenders against the law to justice. It has, therefore, made provision for compelling the performance of this duty, whether the charge is that of committing a minor offence, or that of committing a grave offence. If you are able to give material evidence in any such case, you will probably think it right to let it be known. I say *probably*, because it is quite possible that the case may be one in which you do not feel called upon to put yourself to the grave inconvenience and almost certain loss which are caused through being a witness on such an occasion. Of course, if what you can say tends to show that the accused is not

[1] The most serious charges are supposed to be only triable at Assizes, but the present classification is arbitrary and unsatisfactory.

guilty, you will not hesitate, but will let him or his friends know what you have to say, and will take care to be present at the inquiry.

As I have already mentioned, whether you volunteer to give evidence or not, you can be compelled to attend before the justices. If it is made appear to any Justice of the Peace in whose jurisdiction you live, by the oath of any one, that you are likely to give material evidence for the prosecution, or for the prisoner,[1] and that you will not voluntarily appear for the purpose of being examined as a witness at the time and place appointed for the examination of the witnesses against the accused, he *must* issue a summons requiring you to attend. If you don't attend, and can offer no "just cause" for not attending, he may issue a warrant against you, upon which you will be arrested and brought up. He may even issue a warrant in the first instance if he is satisfied by sworn evidence that it is *probable* that you will not attend and give evidence without being compelled to do so. Where you have attended in obedience to the summons, or under the compulsion

[1] 30 & 31 Vic., c. 35, ss. 3 & 4.

of a warrant, you may be sent to prison for not more than seven days if you refuse to give evidence, or refuse to answer such questions as may be put to you without offering any just excuse for such refusal.[1] These provisions, broadly speaking, apply equally to all offences.[2] Where, however, the charge is one which can be decided at once by the justices, you cannot be apprehended under a warrant for disobeying a summons to attend and give evidence unless it is proved upon oath that "a reasonable sum was paid or tendered to you" for your costs and expenses.[3]

With this exception, no tender of fees or expenses is necessary, either on the part of the prosecution, or of the prisoner in criminal cases.[4]

The legislature has, however, made provisions for

[1] 11 & 12 Vic., c. 42, s. 16.

[2] The main exceptions are made in s. 35 of 11 & 12 Vic. c. 43.

[3] 11 & 12 Vict., 43, s. 7.

[4] Pell *v.* Daubeny, 5 Ex. R. 959. Per Bayley, J., cited 2 Russ., C. & M., 948 n. R. *v.* Cooke, 1 C. and P. 322. Except where you are living in another distinct part of the United Kingdom, in which case you are not liable to any punishment for disobedience to a summons, unless at the time you are served with it a "reasonable and sufficient sum of money to defray your expenses in going, attending, and returning," has been tendered to you. 45 Geo. 3, c. 92, s. 4.

the payment of the expenses incurred by witnesses in criminal cases. If the charge is one which must be tried before a jury, then, as a general rule, you will be allowed your expenses of attending before the magistrates, either as witness for the Crown or prisoner,[1] whether the accused is committed for trial[2] or discharged.[3] The scale is not very liberal, and its allowance is in the discretion of the examining magistrate. Medical men and lawyers get *not more* than 10s. 6d. a day for each attendance to give professional evidence, if they live in or not more than two miles from the place where the examination takes place. If they live elsewhere, they may get a guinea. But their evidence must be professional. If it is not, they get the allowance only of ordinary witnesses. This allowance is 1s. a day when the witness lives in or not more than two miles from the place where the examination is taken, and 1s. 6d. if he lives elsewhere, or if he is detained from home more than four hours. If he is detained from home more than six hours, he may be allowed 2s. 6d. If he lives at such a distance that he must sleep

[1] 30 & 31 Vic., c. 35, s. 5. [2] 7 Geo. 4, c. 64, s. 22.
[3] 29 & 30 Vic., c. 52, s. 3.

from home, he may be allowed not more than 2s. 6d. a night. For travelling expenses, doctors and lawyers may be allowed not more than 3d. a mile each way, if they have to come more than two miles. All other witnesses who have to come more than two miles are allowed second-class fare if they can come by rail, or 3d. a mile each way if they cannot.

If the accused is committed for trial, you are bound over to attend and give evidence, either at the Quarter Sessions or the Assizes, as the case may be; and when you have attended and given evidence, "the Court"—that is, the presiding judge—may, if it thinks fit, allow you the following sums for your "trouble, expenses, and loss of time."

If you are a lawyer or a doctor, you will get a guinea a day for attending to give professional evidence, with 2s. 6d. allowance for each night you are necessarily away from home at Assizes, and 2s. at Quarter Sessions. You will also get not more than 3d. a mile each way for travelling expenses, if you live more than two miles away. If you are called, not to give professional, but only ordinary evidence, you will get only the ordinary allowance to

witnesses. This allowance is 3s. 6d. a day, 2s. 6d. for each night you are necessarily away from home at Assizes, 2s. for each night at Quarter Sessions. For travelling expenses, if you live more than two miles off, you will get second-class railway fare, or not more than 3d. a mile each way. It will be seen from the above statement that for any one who is engaged in earning a living, attending as a witness is not a profitable business. This duty of attending to give evidence in criminal cases is indeed one of the most burdensome that a citizen has to fulfil.

It is not so much felt where the witness is well-to-do, and the waste of a day or two is not of much moment. But it is quite a different matter where the witness is a merchant or a shopkeeper, whose attendance at his office or counter is of real importance. Even then the hardship is not so great as in the case of the artisan or labourer, whose subsistence as well as the subsistence of others generally depends on his daily wage. The hardship is increased by the fact that the meagre allowance for expenses is not made until after the witness has attended and given evidence. The effect of this regulation is in every

way objectionable. In a large majority of cases the poorer witnesses are unable to get to the county town without assistance, and this they often obtain from the prosecuting solicitor. Every citizen who is summoned to give evidence, whether in a civil or criminal court, should be entitled to claim that his reasonable expenses should be paid him beforehand.

When it becomes known — as it generally does become known—that you are able to give evidence, you will no doubt be called upon by some one. If your evidence is supposed to be against the person charged, the solicitor for the complainant or for the prosecution, if it is a serious and important case, will come to see you. If it is an ordinary criminal charge, you will probably be called upon by a police constable. If it should happen that what evidence you can give is in favour of the person charged, you will be waited upon by him or some one for him. Whoever comes to see you will want to know exactly what you have got to say, and will probably want to take down in writing what you can prove. There is, as a rule, no objection to this being done; indeed,

on the whole it is usually desirable. Take care, however, not to be induced to overstate facts, or to state as facts what you suppose to have happened.

Remember also that you can give evidence only of what you have yourself done or seen relating to the matter in dispute, and that, as I have before said,[1] you cannot give evidence of what you have heard somebody else say, unless what you have heard is something admitted against himself by one of the parties. It is quite as necessary to bear this in mind where a solicitor or his clerk takes down what you can say, as when the party himself does so, because the solicitor seldom fails to become a partisan, and because unfortunately work of this sort is often done by very ignorant and careless persons in a very slipshod way. For this reason also you should insist upon seeing what has been taken down after it has been copied out, as very often you are made to say what you have not said at all, or what you have said is overstated. This tendency to make too much of your evidence must be expected where there is such a strong inducement to do so, and where, as is too

[1] *Ante*, p. 57.

often the case, the clerk who does this part of the work is not very particular. It is always well, if you can get it, to have a copy of what has been taken down. Of course, when you do not consider it desirable to let either side know what you have to say, you should still write out for your own use exactly what you can prove. If you attend before the justices as a witness in a case which they cannot dispose of at once, your evidence will be taken down in writing by an official. When you have finished, the written statement, which is called a deposition, will be read to you. Take care that you have your wits about you when this is done. Listen attentively to every word. If you are made to say anything you have not said or have not meant to say, stop the clerk and insist upon it being made right, for this deposition will, if the accused is committed for trial, be forwarded to the court at which the final trial before a jury takes place. Both the prosecutor and the accused are entitled to copies of it. If the accused is defended by counsel, any difference between your evidence as contained in this deposition and as you give it at the final trial, will be made the most of by the

counsel for the defence, as you will see farther on when I come to deal with that part of the business.

Whether you are a witness in a civil or criminal case, you will, as I have already explained, be communicated with by some one on behalf of the person in whose favour it is, known or supposed, that your evidence will tell. Whoever it may be,[1] you will learn from him where and when you are to attend. As soon as you get to the place at which your evidence is to be given, put yourself in communication with him, and when the Court has opened never absent yourself without finding from him whether you may safely do so.

If the trial takes place at Assizes, or Quarter Sessions, or a large County Court, where many cases are to be tried, you will probably find the duty very irksome; for you can never be sure when you may be wanted. At criminal trials this is especially the case. And even at civil trials there is far more uncertainty than there should be, though some attempt is made at our larger assize towns to reduce this annoyance by daily

[1] In criminal cases it is usually a police constable who has charge of the case. *Ante*, p. 117.

cause-lists, and by recent rules with reference to the entering of causes. I assume that you have carefully prepared yourself for "testifying the truth according to your knowledge." If so, you will do well to occupy yourself with observing the proceedings in the court which you are attending. There is always much to interest an intelligent person, whether the cases are civil or criminal. As a witness, summoned to attend the court, you ought to be able to find a seat, though at Sessions and Assizes it is frequently difficult to get one.

When the case in which you are a witness is called on, you must, of course, insist upon being allowed to be at hand. It now and then happens that on the application of one side or the other all the witnesses in a case are ordered to be out of court. This is supposed to be done in order that all possibility of collusion may be avoided by examining each witness out of the hearing of the others. It is, however, not a very effective precaution where there really is collusion with a view to false evidence. The solicitor on each side, of course, remains, even if he should be a witness,[1] and, as a

[1] Pomeroy *v.* Baddeley, Ry. and M., 430.

matter of invariable practice, each party in civil actions remains, though it is doubtful whether, as a matter of legal principle, he too ought not to be out of court where he is to be called as a witness,[1] unless he is conducting his own case, when he must, of course, remain in court.[2] But a prosecutor in a criminal case, if he is to be called, ought to withdraw.[3] If, by any chance, the witnesses are ordered out of court, take care to go out at once. Remain, however, near the door, so as to be ready when called, as nothing is so apt to ruffle the temper of those concerned in a case, from the judge down, as any delay in the appearance of a witness after he has been called. For the same reason, be sure not to have a glove on your right hand when you enter the witness-box. It irritates the usher, who has to administer the oath, and the necessary pause whilst it is being taken off, attended as it always is by signs of impatience on all sides, has a very disconcerting effect on

[1] In Charnock *v.* Devings (3 C. and Kir., 378), Talfourd, J., held that he had no power to order the parties to leave the court. But this was before the parties to a cause could be called as witnesses.

[2] Cobbett *v.* Hudson, 1 E. and B., 14.

[3] R. *v.* Newman, 3 C. and Kir., per Lord Campbell, 260.

the witness. Be ready with any notes you may have to produce or refer to, taking care that you keep none which you are not entitled to use.[1]

On entering the witness-box look steadily round so as to clearly understand how you are placed with respect to the judge, the jury—if there is a jury—and the person who is going to examine you. Before he begins his examination, an officer of the court will hand you a Testament, and repeat to you the following form of oath:—"The evidence which you shall give to the court and jury sworn [touching the matter in question][2] shall be the truth, the whole truth, and nothing but the truth, so help you, God." You will then kiss the book. If you are of the Hebrew persuasion, he will, on your saying so, hand you a copy of the Pentateuch, and will repeat the oath in the same way as if you were a Christian. If you are a member of the Society of Friends, or a Moravian Brother, or a Separatist, you will, of course, mention the fact. He will then hand

[1] See *ante*, p. 77.

[2] In criminal trials the words "between our Sovereign Lady the Queen and the prisoner at the bar" (or "defendant" in the case of misdemeanours) are used instead of the words in brackets.

you the proper form of affirmation, which you will repeat after him.[1]

Until within recent times, the law of this country made it necessary that any one who gave evidence should be sworn according to some religious ceremony. A Mahomedan must be sworn on the Koran.[2] The evidence of a Gentoo, who swore by touching with his hand the foot of a Brahmin, was admissible.[3] A Chinaman, who swore by kneeling down, breaking a saucer, and declaring that if he did not tell the truth his soul "would be cracked like the saucer," could give evidence.[4] But no one could testify, either in civil or criminal cases, who did not take an oath of some kind, and in order to take an oath it was necessary that he should believe in the existence of a God, and that divine punishment would be the consequence of false swearing. This is the law still, except so far as Acts of Parliament expressly dispense with the obligation of taking an oath.[5] The first dispensa-

[1] Where a Quaker or Moravian has seceded, he is still entitled to affirm (1 & 2 Vic., c. 77).

[2] R. *v.* Morgan, 1 Lea, ce. 54.

[3] Omichund *v.* Barker, 1 Atk., 21.

[4] R. *v.* Entrehman, 1 Car. and M., 248.

[5] Maden *v.* Catanach, 7 H. & N., 360, per Pollock, C.B.

tion was made in 1839 in the case of the Quakers and Moravian Brethren.[1] And now another Act of Parliament has provided that you shall not be disqualified from being a witness because you object "from conscientious motives" to be sworn, whatever your religious belief may be. In such a case you will be entitled to make a solemn declaration.[2] But in order to claim this privilege you must have *some* religious belief, for the form of declaration is as follows:—"I, John Jones [or whatever your name may be], do solemnly, sincerely, and truly declare that the taking of any oath is, *according to my religious belief*, unlawful, and I do also solemnly, sincerely, and truly declare."

Now there are some who have, or think they have, no religious belief; who doubt, or disbelieve in, the existence of a Supreme Being. In 1869 an attempt was made to meet this case, but it was a rather clumsy attempt. You must object to take the oath, and then "if the presiding judge is satisfied that the taking of an oath would have no binding effect upon your conscience," you will be allowed to make the following declaration:—"I

[1] 9 Geo. 4, c. 32. [2] 17 & 18 Vic., c. 120, s. 20.

solemnly promise and declare that the evidence given by me to this court shall be the truth, the whole truth, and nothing but the truth."[1] The defect in this provision is that it leaves a discretion to the judge. Any one should be offered the alternative of taking the oath or making a declaration without being asked for, or even allowed to give any reason for his choice. Of course, any one who wilfully and corruptly gives false evidence after making a declaration, is liable to the same punishment as if he had taken an oath. All these provisions apply to both civil and criminal cases.

When this formal business of swearing or declaring is over, your examination by or on behalf of the person who has called you will begin. If you are examined by a solicitor or barrister, he will put a few introductory questions to you which will enable you to collect your thoughts, and will then take you on to the important part of your evidence. **Remember to speak clearly and distinctly.** There are certain rules which are intended to prevent a witness from being asked questions in such a way as to suggest to

[1] 32 & 32 Vic., c. 68, s. 4.

him what answers he shall give. These, as I have already mentioned, are called "leading questions." The most common form of such questions is, "Did you do so and so?" or "Did you say such and such a thing?" When such questions are put, the other side may object; and the other side may also object when a question is put, the answer to which is not such as can be received, either because it is not evidence, or for any other reason. When lawyers are engaged on both sides, or on one side only, objections are constantly made to questions on the ground that they ought not, for these and other reasons, to be put. Where there are lawyers on *both* sides, such objections lead to much wrangling. The objection to questions because they are leading questions is often made when it should not be made; for the rule does not apply to that part of the evidence which is merely introductory to the really important part.[1] Even where the objection is properly made, the question, and the suggestion it makes, have generally got to the ears of the witness, so that the mischief, if any, has been done. These discussions

[1] Nicholls *v.* Dowding, 1 Stark, R. 81, per Lord Ellenborough.

seldom, therefore, serve any useful purpose, except occasionally to put the witness out. When you hear the words, "I object," or "Don't answer that question," don't say a word until you are told to go on. And don't get flustered. You have, so far, at all events, done nothing wrong. But listen attentively to what is said, particularly to what the judge says, for his discretion as to allowing a question to be put, although it is a leading question, is absolute.[1] It may be that the question you have been asked is one which you may answer, and that the only objection is that the way in which it has been put points out the answer you are expected to give. In that case it will be repeated in a different way, and then, of course, you will state the fact—if it is a fact—which the question suggested. But it may also be that the question is one the answer to which you would not be allowed to give as evidence. If the judge decides that it is of this sort, you will, of course, take care not to refer to it, otherwise you will expose yourself to an angry remark from the opposing counsel, and possibly a sharp word of remonstrance from the man who is

[1] Moody *v.* Rowell, 17 Pick., 498.

examining you; for, however glad he may be to get out the fact, it is not impossible that he may be mean enough to make a scapegoat of you. Sometimes, too, on these occasions, the judge also lectures you on the enormity of your conduct, and you have a bad time of it all round.

I have already told you[1] that you have the right to refresh your memory by referring to any written note or entry in a book, made by yourself either at the time of the fact it relates to, or at farthest so recently afterwards as to render it probable that your memory had not then become defective. You had better refer to what I have said about making your note or entry as soon as possible, having the original note or entry ready, and being prepared to hand it to the person who is going to cross-examine you upon it. **As much as possible stick to facts.** But if you should have to state a fact which you think needs explanation, state the fact and then give the explanation. It may be that though nearly sure, you still do not feel quite sure as to a particular fact. In that case say so, for though our law of evidence

[1] *Ante*, p. 102.

requires that you shall depose to such facts only as are within your own knowledge, it does not, to use the words of the text-book, require you "to speak with such expression of certainty as to exclude all doubt."[1]

Be also particularly careful to keep back nothing. State all you know. When your proof is taken down, the person who takes it down, if any part of your evidence is adverse to his client, will try to omit it. If so, insist upon it being put down. You are bound to tell everything without reservation. Our law properly adopts this view, so that if only half the story is told at first, the other half may be got out by cross-examination.[2] For this reason, any attempt to keep back evidence is ill-advised as a matter of policy, though, of course, this does not concern you.

I have said that you are to state facts. You are not, as a rule, to express opinions or even to draw inferences. You may, for instance, say what you have heard or observed in the conversation or conduct of one whose sanity is in

[1] Taylor on Evidence, 2.

[2] May. & Corp. of Berwick *v.* Murray. 19 L. J., ch. 281, 286.

question; but you would be pulled up very sharply if you expressed your opinion or belief as to his being sane or not.[1] There are some exceptions to this rule. If you have had opportunities of observing the mutual deportment of the parties in a breach of promise case, you may express your opinion as to whether they were attached to each other.[2] And if you are what is called an "expert," you may express pretty well any opinion you like on the matter in hand. But on this branch of the law of evidence I shall say nothing, for I much doubt whether I should be doing much service if I tried to explain what an expert is, and what opinions he may express. I certainly do not intend these hints for the use of experts.

During your examination-in-chief you will be civilly treated, for you will no doubt be called by the side in whose favour your evidence is expected to be. But you must expect very different treatment when the other side or his advocate gets up to cross-examine you, for his

[1] The American law allows those who have had opportunities of observation to express such an opinion or belief. Clary *v.* Clary, 2 Iredell, 28. Chase *v.* Lincoln, 2 Mass., 237.

[2] Trelawney *v.* Colman, 2 Stark, R., 192.

object is as much as possible to discredit you and your evidence.

The way in which you are handled by the cross-examining advocate or counsel, will depend upon the qualifications of the man who does the work. If he is able, experienced, and judicious, he will treat you with consideration, and will put whatever questions he does put in a quiet way, as if he were seeking further information. For he is well aware of the dangers which attend reckless cross-examination. His object will be to lead you into some statement or admission which does not agree with what you have already said. If you have given your evidence-in-chief honestly and straightforwardly, there will not be much danger of your being entrapped into any such apparent difference. Should this happen, however, you will, of course, if possible, set it right at once. This he will probably try to prevent. If so, don't be too eager about it. It may be desirable to wait till he has done. The other side will, doubtless, re-examine you. Then you can give your explanation without being interrupted. But, as a rule, give your explanation as soon as any apparently unfavourable

admission has been obtained from you. It is your right, and if, as occasionally is the case, it is clear that a strong prejudice will be created in the minds of the jurymen unless the matter is at once set right, you should insist upon making your explanation, and, if necessary, appeal to the judge. Men who are able, experienced, and judicious, are, however, not common either in the law or elsewhere, and the chances are that the man who cross-examines you will try to browbeat you. **Don't be afraid of him.** If you are not, and if you take care not to lose your temper, you are sure to have the best of it. Great latitude, which is too often allowed to become licence, is given to advocates and counsel. But an honest witness, if he retain his self-possession, ought never to get the worst of it. You should never bandy words with the man who is cross-examining you. But if he is grossly impertinent you are entitled to resent it, and should do so temperately but firmly. If the judge is a just judge, and a fairly strong judge, he will back you up.

I have already said that if you are called to prove only one simple fact, you may be cross-

examined as to what you know about everything that is in dispute ;[1] and I have warned you to tell all you know in the first instance. But though great latitude is allowed, the cross-examiner has no right to ask you questions on matters outside of the question in dispute. To this there are exceptions. He is allowed to try to damage your character by asking you whether you have been guilty of crime or of improper conduct.[2] If the crime or improper conduct suggested have reference to the inquiry, your denial may be met by proof that the suggestion is true. If not, your denial will be conclusive, unless it is suggested that you have been *convicted* of an offence. In that case the conviction may be proved against you.[3]

This is an awful consequence of a criminal conviction—no one can fully realise how awful who has not seen the effect produced on a witness who

[1] Morgan *v.* Brydges, 2 Stark, Rep. 314.

[2] Harris *v.* Tippett, 2 Camp., 638. R. *v.* Yewin, id., 639. R. *v.* Barnard, and R. *v.* James, cited in note to 1 Car. and P., 86, 87. R. *v.* Watson, 2 Stark, R. 149. 32 How, St. Tr., 292 *et seq.*, S.C. R. *v.* Lewis, 4 Esp., 225, Macbride *v.* Macbride, id., 242, and R. *v.* Pitcher, 1 C. and P., 85, where questions tending to degrade were not allowed to be put, are not any longer authorities.

[3] 28 and 29 Vic., c. 18, s. 6.

has once been so branded, by the question, "Have you ever been in trouble?" Yet it occasionally works the most cruel injustice. A man has committed some petty theft when a lad, it may be many years before. He has retrieved his character, lived an honest life, become an honest citizen. If he enter a witness-box he may have his character blasted. The great majority of mankind are neither heartless nor spiteful. But they have themselves and their own interests to think of. They cannot be expected to do more than accept without scrutiny facts publicly stated which affect others. I can only advise any honest citizen—for I should be sorry to think it impossible that any one who has once committed a theft should ever become honest—who has been convicted of crime, not to enter a witness-box at all, if he can in any way avoid doing so.

I have said that you cannot be asked about matters which do not relate to the subject of the trial. But anything you have said or done which tends to show that you have an interest, or even a strong feeling, one way or the other, may have a very important bearing on the question. You may,

therefore, be asked whether you have expressed feelings of hostility towards one side or the other, in a civil action,[1] or against the prisoner in a criminal trial,[2] and if you deny that you have, you may be contradicted by other witnesses.[3] For this reason, if for no other, avoid as much as possible entering into any casual conversation or discussion on the subject of any case in which you expect to be called as a witness.

You may also be asked whether you have not made a statement which is in any particular inconsistent with the evidence you have just given, and if you deny that you have, proof may be given that you did in fact make such a statement. Bear in mind, however, that you cannot be asked generally and vaguely whether you have made some statement which does not agree with your evidence. "The circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to you," and you "must be asked"

[1] Attwood *v.* Welton, 7 Conn., 66; an American case.

[2] R. *v.* Yewin, 2 Camp., 638.

[3] So it would appear from the dictum in A. G. *v.* Hitchcock, 1 Ex. R. 94, 100, 102, though in Harrison *v.* Gordon, 2 Lew., C.C., 156. Alderson, B., is said to have held otherwise.

whether or not you have made a particular statement.[1]

If the suggested contradictory statement is in writing, you are not entitled to have the writing shown to you, but if it is intended to contradict you by it, your attention must be called to those parts of it which are to be used for the purpose of contradicting you.[1] The occasion on which you will be exposed to this kind of cross-examination will probably be a criminal trial, where you will have already given your evidence before the justices. If the prisoner is defended, the barrister who defends him will have a copy of your deposition before him, whilst you are telling your story for the second time, and will be sure to note any variation or addition. This he will probably try to make the most of.

It may be that you have made some slight addition to your evidence before the justices, such

[1] 17 & 18 Vic., c. 125, s. 23. Angus *v.* Smith, M. & M., 473 Crowley *v.* Page, 7 C. & P., 789. Andrews *v.* Askey, 8 C. & P., 7. Magrath *v.* Browne, Arm. M. & O., 133. The Queen's Case, 2 B. & B., 313-14.

[2] 17 & 18 Vic., c. 125, ss. 24 & 103. 28 & 29 Vic., c. 18, ss. 1 & 5.

as "there were several persons in the room," instead of "there were six or seven persons in the room."

This the counsel will deal with as follows :—

"You have told us that there were several persons in the room. You were examined before the magistrates?"

"Yes."

"And your evidence was taken down and read over to you, and you signed it?"

"Yes."

"Now listen to me." Awful pause, during which the barrister glares at you. "Did you say that before the magistrates?"

If on this being put to you the counsel who has examined you in chief or the judge does not interfere, which is not at all impossible, you should reply—

"If I did say anything on this point I must ask you to read it."

Then he will be obliged to read out, "There were six or seven persons in the room."

Upon this you will observe, "I have no doubt that was what I did say. I consider it sub-

stantially the same thing." Or it may be that you add some immaterial facts which escaped your memory at the trial, such as—

"The prisoner had a brown cap on," instead of "the prisoner had a cap on."

Thereupon the cross-examining counsel will sternly ask you—

"Did you say one word about the cap being brown in your evidence before the magistrates?"

Strictly speaking, these questions as to omission can be put only by the judge.[1] You are not entitled to look at the deposition yourself to make sure. Your reply therefore should be—

"It is possible that I did not, but I must ask that what I did say should be read."

It is, however, very desirable that you should not, in criminal cases, add to your evidence if you can help it, for such additions weaken its effect; and the more important they are the more forcible will be the grounds for urging that they are afterthoughts had recourse to for the purpose of bolstering up the case.

[1] Who has power "to make such use" of the written statement "for the purposes of the trial as he may think fit." 17 & 18 Vic., c. 125, s. 24.

Of course, you cannot avoid immaterial discrepancies or variations, and though a sharp advocate will make a good deal of merely verbal differences, they will have no weight with the judge, and he will take care, if he is equal to his work, that they will have none with the jury.

As you will have gathered from what I have already written, the person by whom you are called, or his advocate, has the right when your cross-examination is over to ask you questions in re-examination, with the object of explaining or setting right anything you have said in cross-examination.

I have already mentioned that as a general rule, where anything which has to be proved is in writing, the writing must be produced. This is only common sense. Where what has taken place or what is agreed to be done has been put into writing, it is reasonable to suppose that the written terms contain a correct statement of what took place or was agreed. In case, therefore, of dispute, it is but fair to require that the writing should be produced. Our law-books are full of cases which settle when such writings must be produced. The exceptions, however, are so few that you may take

it broadly that you must be prepared to produce all writings which bear on the matter in dispute. You will, of course, have preserved your part of any agreement, and you will also, I hope, have kept all letters written to you as well as copies of all you have written on the subject. The other side should be called upon to *produce* all original papers, and to admit all copies in your possession. As to the service of these notices on the other side, you had better—unless, of course, you employ a solicitor—see the Clerk at the Registrar's Office, taking with you a memorandum of the dates of the papers and letters you want to have produced and admitted.

The object of giving these notices is to save trouble and expense in proving any writing or letters you want to use. This will not be necessary if the person against whom you want to prove it admits it.[1] If it is in his hands, and he refuses to produce it,[2] or it is in the possession or under

[1] Slatterie *v.* Pooley, 6 M. & W., 664.

[2] Mr. Justice Stephen doubts whether the case (Entick *v.* Carrington, 19, S. T. 1073), cited in support of this proposition, proves it. But he states it as a rule of evidence, and, as he observes, it is a necessary rule of evidence.—"Digest of Law of Evidence," p. 69.

the control of a stranger who is not legally bound to produce it;[1] or if it can be shown that it has been destroyed or lost;[2] in any of these cases its contents may be proved by copies or even by oral accounts of the contents, given by some one who has himself seen the original writing.

[1] Miles *v.* Oddy, 6 C. & P., 732. Marston *v.* Downes, 1 A. & E., 31.

[2] The actual destruction need not be proved (R. *v.* Johnson, 7 East, 66). Nor need the loss be further proved than by your swearing that you have made reasonable search for it (R. *v.* Saffron Hill, 22 L. J., M. C. 22.)

## CHAPTER V.

### HINTS TO JURYMEN.

Liability to serve—Special Juries—Persons exempt—Jury Lists—Defects of the present System—The Grand Jury—Common and Special Jurors—The Swearing-in—The Foreman—Hints to Jurors during a Case—The Summing-up—Considering the Verdict—Certificate of Service.

When a question of fact, either in a civil action or criminal charge, has to be tried by a jury, a jury must be summoned to try it. The duty of serving on juries is in most cases irksome, and, in almost all cases under the present arrangements, causes serious expense or loss to the juryman. It is, however, imposed on a comparatively limited body of citizens.

If you have £10 a year clear in land for life, or on a lease for ten years, or for any number of years, determinable on the death of somebody; or if you live in the County of Middlesex and are rated to the poor rate or the inhabited house duty on a

value of not less than £30 a year; or if you live in any other county and are similarly rated on a value of not less than £20; or if you occupy a house which has not less than fifteen windows, you are liable, unless you come under any of the many exemptions I shall soon mention, to serve on juries in all the Superior Courts and at Assizes, as well as on both grand and petty juries at Quarter Sessions[1] and on juries at Coroners' inquests.[2]

If you are a burgess of any borough which has a separate Court of Quarter Sessions, you are qualified and liable to serve on either the grand or the petty jury at the Quarter Sessions for the borough.[3]

Where the dispute is a civil dispute, either of the parties may on certain terms have the case tried before a special jury. Every man who is "legally entitled to be called an Esquire," or who

[1] 6 Geo. 4, c. 50, s. 1. 33 & 34 Vic., c. 77, s. 1.

[2] 6 Geo. 4, c. 50, s. 52. Except in liberties, franchises, cities, boroughs, or towns corporate, not being counties, or any cities, boroughs, or towns which are counties of themselves. In these, the juries are to be of the same description as before the Act, whatever that may be.

[3] 5 & 6 W. 4, c. 76, s. 121.

is "a person of higher degree," or "a banker or a merchant," or "who occupies a private dwelling-house rated or assessed to the poor rate or to the inhabited house duty on a value of not less than £100, in a town containing at the preceding census 20,000 inhabitants, or £50 elsewhere," or who occupies premises, other than a farm, rated or assessed at not less than £100, or a farm rated or assessed at £300, is qualified and liable to serve on special juries.[1]

If, however, you are under twenty-one or over sixty you are not bound to serve; and there are a large number of dignities, offices, and occupations, the possession or pursuit of which is made by Act of Parliament a ground of exemption from the performance of this duty. The following is a list of persons thus exempt:—

Admiralty Court. Officers of the
Apothecaries certificated by Apothecaries' Company.
Army Officers, while in full pay.
Barristers actually practising.
Borough Treasurers.
Burgesses of Boroughs having a separate Quarter Sessions, so

[1] County Juries Act, 1870, s. 1.

far as the Quarter Sessions of the County in which they are situated are concerned.

Chancery. *See* "Courts of Law."

Chemists. Pharmaceutical, if registered and actually in practice.

Civil Law. Members of the Society of Doctors of

Civil Law. Advocates of, if actually practising.

Clerks. *See* "Police Magistrates."

Clerks, Managing. *See* "Solicitors."

Clerks of the Peace and their deputies.

Conveyancers. Certificated

Clergymen.

Coroners.

Correction. Keepers and Sub-Officers of Houses of

Courts of Law and Equity. Officers of the

Customs Commissioners. Officers or Clerks of the

Dentists, if duly registered (40 and 41 Vic., c. 33, s. 30).

Dissenting Ministers. *See* "Ministers."

Doctors. *See* "Medical Practitioners" and "Civil Law."

Ecclesiastical Courts. Officers of the

Equity Courts. *See* "Courts of Law."

Gaolers and their Sub-Officers.

House of Commons. Members and Officers.

House of Lords. Peers and Officers.

Income Tax Commissioners (43 and 44 Vic., c. 19, s. 40).

Inland Revenue. Commissioners and Officers of

Jews. *See* "Ministers."

Judges, of all the Courts.

Justices of the Peace.

For Counties—So far as relates to any jury summoned to serve at any Sessions of the Peace, for the jurisdiction of which he is a Justice of the Peace,

For Boroughs—So far as the County in which the Borough is situated is concerned.

Law Courts. *See* "Courts of Law."

Lawyers. *See* "Barristers," "Conveyancers," "Notaries," "Special Pleaders," "Solicitors."

Lords, House of. *See* "House of Lords."

Lunatic Asylums. Keepers in Public

Magistrates, Metropolitan Police. *See* "Police Magistrates and "Justices."

Medical Practitioners.

Members and Licentiates of the Royal College of Physicians, if actually practising.

Members and Licentiates of the Royal Colleges of Surgeons of London, Edinburgh, and Dublin, if actually practising.

All registered Medical Practitioners, if actually practising.

Members of Parliament.

Mersey Docks and Harbour Board, Members of the.

Militia. Officers of the, whilst on full pay.

Ministers of any Congregation of Protestant Dissenters and of Jews, whose place of meeting is duly registered, provided they follow no secular occupation except that of Schoolmaster.

Navy, Officers in the, whilst on full pay.

Notaries (Public), in actual practice.

Peers.

Physicians. *See* "Medical Practitioners."

Pilots licensed by the Trinity House, and all Pilots licensed under any act or charter.

Police Officers (Rural and Metropolitan).

Police Magistrates (Metropolitan). Their clerks, ushers, doorkeepers, and messengers.

Post-Office Officers.
Priests. Roman Catholic
Probate Court. Officers of the
Proctors, if actually practising and having taken out their certificates.
Protestant Dissenting Ministers. *See* "Ministers."
Queen's Household Servants. The
Registrars of Births, Deaths, and Marriages. Superintendent Registrars and (26 and 27 Vic., c. 11, s. 29).
Roman Catholic Priests.
Serjeants-at-Law (so many as remain).
Sheriffs' Officers.
Solicitors, if actually practising, and having taken out their annual certificates; and their managing clerks.
Special Pleaders.
Stipendiary Magistrates.
Surgeons. *See* "Medical Practitioners."
Town Clerks.
Town Councillors.
Trinity House. The Master, Warden, and Brethren of the
Yeomanry. Officers in the, whilst on full pay.

It is the duty of the churchwardens and overseers of the poor in every parish, and of the overseers of the poor of every township,[1] to make out before September 1st in every year, a list of all men in their respective parishes and townships

[1] In obedience to a precept which the Clerk of the Peace of each county is required to send them on or before the 20th of July in every year. Juries Act, 1862, 25 & 26 Vic., c. 10, s. 1.

qualified and liable to serve on juries. It is also their duty in making out this list "to specify which of such persons are in their judgment qualified as special jurors." They are also required to "specify in every case the nature of the qualification and also the occupation and the amount of the rating of every such person."[1] The act, however, expressly and most properly provides[2] that the fact that you are on the special jurors' list, or are qualified to be a grand juror shall not exempt you from serving as a common juror. In the face, however, of this express provision, it was until recently the common practice, not only to make out a separate list of those who were qualified to be special jurors, but to take their name out of the general or common jury list.[3] On referring to the qualifications of special jurors, it will be seen that all those belonging to the well-to-do classes were thus reserved for the trial

[1] County Juries Act, 1870, s. 11. [2] Ibid., s. 19.

[3] The County Juries Act of 1825 certainly did direct the Sheriff to "take from the year's jurors' book the names of all men who shall be described therein as esquire, person of higher degree, or as banker or merchant," and place them in a separate list, to be called the "Special Jurors' List." This direction had probably been construed to mean that their names should be altogether removed from the General Jurors' List.

of civil cases, and relieved from the work of trying criminal charges and minor civil disputes. The effect of this was in every way objectionable. It created a privilege for the rich. It relieved them from taking their fair share in the more onerous and important duty of deciding as to the guilt or innocence of those charged with offences, and of sitting upon juries in the smaller civil actions. Fortunately this serious and unconstitutional violation of the law was detected by some of our judges—notably, Lord Bramwell and Lord Chief Justice Coleridge. They expressed their disapproval of it in the strongest terms, and said that it must be discontinued. It has, I believe, been discontinued in most cases. I have myself been more than once an amused listener to the expressions of anger by men qualified to serve as special jurors, because they have been summoned as petty jurymen.

The lists made out by the churchwardens and overseers are affixed on the first three Sundays in September on the doors of all the churches and chapels in the parish or township, with a notice at the foot stating that all objections to the list will be heard by the justices at a time and place which

will be mentioned.[1] If you have any ground for exemption, you must attend this meeting and apply to have your name taken off. Unless you do, you must attend if summoned,[2] although you may have good ground for exemption.

If your name has been put upon the jury list for a county, you are liable to be summoned at any time, either to the Quarter Sessions or to the Assizes,[3] or to a County Court.[4] If you live in the City of London,[5] and are put on the proper jury list, you may be summoned to serve on juries at the Royal Palace of Justice,[6] and to serve either on grand or petty juries at the Central Criminal Court,[7] or on juries at the Lord Mayor's Court, or at the

[1] Juries Act, 1825, s. 9.

[2] County Juries Act, 1870, s. 12.

[3] 6 Geo. 4, c. 50, s. 52. See supra, p. 146.

[4] 9 & 10 Vic., c. 95, s. 72.

[5] Which is a county of itself.

[6] To try actions in any of its Divisions, or (21 & 22 Vic., c. 25, s. 3) questions of fact directed to be heard by the Chancery Division, or (20 & 21 Vic., c. 77, ss. 36, 37) to try divorce cases or the validity of wills.

[7] 4 & 5 W. 4, c. 36, s. 4. Those who live in such parts of Essex, Kent, and Surrey, as are within the jurisdiction of the Central Criminal Court, are also liable to serve on the grand and petty juries of that court (*ib.*).

City of London Court. If you live in the County of Middlesex you are—if on the jury list—liable to be summoned to serve on juries at the Royal Palace of Justice, at the Central Criminal Court, and the Metropolitan County Courts. Wherever you live, if you are on the jury list, you may be summoned to serve on a jury at a Coroner's inquest,[1] or on an inquiry whether a person is sane or not.[2]

I have done my best to explain the present law as to the liability of the citizen to serve on juries. But it is made up of so many Acts, which dovetail into each other in such a puzzling way, that it is very hard to make out what the law really is. These Acts ought to be put together in one simple and intelligible law; and when this is done, I hope the people will take care that those whom they send to Parliament to make their laws shall make it—what it is not at present—a just law.

For as it now stands it has very grave defects. Those are exempted who have no reasonable claim to be exempted, and the great body of the people are shut out by a property qualification. Every

[1] 6 Geo. 4, c. 50, s. 52. [2] 25 & 26 Vic., c. 86, s. 4.

householder should be liable to take his turn at the work. It is, no doubt, an irksome duty, but it is an honourable and useful duty, and every citizen should be called upon to discharge it, particularly in criminal cases. In civil cases a jury is seldom of any use, as the experience of our County Courts has completely shown. This experience has, I am glad to say, at last led to the passing of rules, the effect of which has already made jury trials in the High Court much fewer than they used to be, and will, if the rules are properly worked, make them still fewer.

But though every citizen should be called upon to take his share of such work, no one should be called upon to do it at his own expense. One of the most serious defects in our jury system is that those who are called upon to discharge the duty are practically not paid for their work.[1] If you are summoned as a common juryman, you must either run the risk of being fined, or you must attend during the whole of the sittings at your own expense. This is a grave hardship on the common juror.

[1] Each common juryman gets one shilling for every verdict.

When you are summoned to serve on a jury the summons will come to you by post,[1] but it must reach you six days at least before the day on which you are required to attend,[2] otherwise you are not liable to any penalty for non-attendance. Even when you have not had the required notice, however, it would not be prudent to disobey the summons. If you are summoned on the grand jury, either at Assizes or Quarter Sessions, you must be present at the very beginning to be charged by the judge or chairman. Until quite lately no business was ever taken on the first day of the Assizes, which was called the Commission Day, because on that day the Sheriff received the judges, and the Royal Commission for holding the Assizes was opened and read. But recent rules direct that the business shall begin on the first day; the long formality of reading the proclamation against vice and immorality is also dispensed with, though some of the judges have insisted on still having it read. The grand jury

[1] Juries Act, 1862, s. 11 (25 & 26 Vic., c. 106, s. 11).

[2] Juries Act, 1870, s. 20. This is to apply to *any* jury (*see* 6 Geo. 4, c. 5, s. 25, which appears to have been repealed by this section).

consists of from thirteen to twenty-three[1] jurymen. When you have been called and sworn, the judge or chairman charges you—that is, draws your attention to the more important cases in the printed list of persons to be tried. This list is called the Calendar, and you will be supplied with a copy. When the judge has finished his address, you will be taken to the grand jury room. Here you will elect a foreman, and a succession of policemen will appear with pieces of parchment, which contain what is usually a short statement of the charge against each person.[2] These are called the Indictments. As each indictment is brought in, the policeman in charge of the case brings in the witnesses who are to prove it. He will do all the necessary formal work. The duty of a grand jury is not to try the case. All they have to do is to decide whether the case is one which ought to be tried by the petty, or common, jury. It must be borne in mind that with very rare exceptions indeed,[3]

[1] There must be at least twelve, and the finding must be by not less than twelve.

[2] In some cases, such as perjury, it is often very long.

[3] In charges of perjury and conspiracy where the magistrate refuses to commit, Vexatious Indictments Act (22 & 23 Vic., c. 17).

every case has already been carefully gone into before the magistrates, who have decided that the case ought to be tried by a jury. The work done by the grand jury is therefore quite useless, and here, again, I hope the people will insist that the waste of their time and money, at all events at Quarter Sessions, shall be given up. As, however, you have been brought there, the best thing you can do is to see that as little time as possible is wasted. If you are lucky enough to have a sensible and businesslike foreman you will not be kept long over each case. The evidence of the chief witness will usually be quite sufficient to warrant your deciding that the case must be tried. If so, you find a true bill. If by any chance it is decided by a majority of the grand jury that the case ought not be tried, they find no true bill. As soon as the first true bill is found, the foreman, having written a "True Bill" on its back, goes with one or two others into the court, and hands it to the officer who sits below the judge. The officer looks at this bill, and says, "Gentlemen of the grand jury, you find a true bill against John Jones for forgery." To which the foreman assents by a

nod or bow, and returns with his fellows to the grand jury room. The common jury are put to try the case for which the true bill has been found, and having work found for them which will occupy them for some little time, the grand jury wait until several bills have been found or ignored before they return to court. When all the indictments have been brought before you and disposed of, you are called into the court and dismissed by the judge, with the thanks of the country—which is all the reward you will get—for your services.

If you are summoned to attend as a special or common juror at the Assizes or Quarter Sessions, you must be there on the day and at the hour named on the summons; unless you receive a notice from the Under-Sheriff or Clerk of the Peace that you will not be wanted before a later day. It is not necessary that you should—as in the case of a grand juror—be in the Criminal Court when it opens. There are, however, in spite of the recent rules, sometimes two courts sitting at Assizes, one for trying criminal cases, the other for trying civil actions.

If you are a special juror, you need attend only in the civil court. If a common juror, you may be wanted in any court that is sitting. The business of trying criminals cannot begin until the grand jury has been charged and has found a bill for the common jury to try. But the judge who tries civil actions sets to work at once. Make your way, therefore, into the civil court, and carefully observe what is done. In some counties it is the practice to take only cases for trial before a special jury on the first day. In others it is the reverse. In others, the list of causes is gone straight through. But something will almost certainly be said by one or two of the counsel, which will explain to you what the arrangement is. As soon as preliminaries have been settled, an officer of the court, who sits under the judge, will say, "Gentlemen of the petty jury," or "Gentlemen of the special jury" (as the case may be), "answer to your names." Then he will take a card from a box before him and call out the name of a juryman. "Thomas Jones, of Highmead, farmer." If Thomas Jones answers, he will be told to "go into the box." He will certainly answer if he is there,

and it is a special jury case, as special jurymen get a guinea each for each action. If he is there, and it it is a common jury case, he will probably not answer the first time he is called, but wait and see whether twelve other jurymen answer to their names. If they do, he has escaped for that time. But he is not yet safe. In due course the business of the other, the Criminal or Crown Court, begins. An officer of the court shouts out, "Common jurors wanted in the other court," and he must hurry off to find another officer calling out names from cards. If you have come from a distance, so that your day is lost, you had better answer to your name, and do your share of the work, which is quite worth doing. If you live in the town and have business which really requires your attention, you may—if others are ready to do the work—snatch whatever time you can get. Remember, however, that "if after being thrice called," you "are present but do not appear," the presiding judge, if he finds that you have done so, "shall set such fine upon you as he may think meet," unless the juror can give "some reasonable excuse by oath or affidavit." From this it would seem that the judge may impose

what fine he pleases. As a matter of fact, however, the fine imposed on common jurors rarely, if ever, exceeds £5, which is the largest fine that can be imposed on a juror for neglecting to obey a summons to attend a County Court.[1]

Occasionally, after some parley by counsel with the officer of the court, the latter says to a juryman who has been called, "Mr. Jones, you will not be wanted at present." This means that for some reason or another, one side or the other objects to you, and you leave the jury box. As soon as twelve men are got into the box, the officer of the court will say, "Gentlemen, stand up." If you are in the court where civil actions are to be tried, four Testaments will be handed to the twelve jurymen, and you, with three others, will take hold of one of them. You must take hold of it with your right hand, which must be ungloved. The officer, when he sees that you have all got hold of a book, will say, "You shall well and truly try the issue joined between the parties, and a true verdict give according to the evidence, so help you, God!" Then each of the

[1] 9 & 10 Vict., c. 95, s. 72.

jurymen in turn kisses the book. When you have kissed the book sit down. The officer, when you have all sat down, says, "The jury are sworn in Freeland against Tomkins."

If you are called as a juror in the Criminal Court, when twelve are got together, and have been told to stand up, you will, as a rule, be sworn separately from the others. The Testament will be handed to you in your turn, the clerk will say, "You shall true deliverance make between our Sovereign Lady the Queen and the prisoner at the bar, and a true verdict give according to the evidence, so help you, God!" Then kiss the book, and remember to sit down at once. It shows that you are sworn, and if you remain standing you put the officer out. When all the jury have been sworn, the clerk makes an old-fashioned proclamation which has no real significance. Then another official gives the prisoner in charge to you, that is, he says, "Gentlemen of the jury, the prisoner at the bar is charged with having, on the 10th day of May, at such-and-such a place, stolen a piece of cloth, the property of William Wilkins." Then he tells you that you are

"to hear the evidence, and say whether the prisoner is guilty or not guilty." After you are sworn, whether the case is a civil case or a criminal charge, a barrister gets up and says, "May it please your Lordship, gentlemen of the jury," and goes on to state what the case or charge is. Where the charge is very simple, he sometimes calls the witnesses who are to prove it without making any statement.

I have never sat upon a jury, but I have sat for many days watching, with keen and attentive interest, juries try cases. Therefore I think I may safely give a few hints about the work to be done.

Every jury is supposed to elect a foreman. Generally, however, I believe there is no actual election or selection, but some one by a kind of silent assent is turned to as the foreman—the first man. The only recognised duty of the foreman is to deliver the verdict. But he generally is a man who, by reason of his being more able and decided than his fellows, leads them.

My advice to you as to the way in which you can best do your duty on a jury is that you **keep your ears and eyes open and your mouth shut.**

Listen attentively to what is said, watch carefully all that goes on, particularly the witnesses as they give their evidence. The jury are the judges as to the facts, and any juryman has the right to have a question put to a witness. But as the judge has the right to do so too, and as there is always one lawyer—there are generally two in civil cases—whose special work it is to get out all the facts, it is very seldom desirable that a juryman should put in his oar. Take care, therefore, that you don't interfere unless you are quite sure that something has been omitted. In any case keep your questions until the examination of the witness is quite finished, for it is almost certain that before he is done with the fact you want will come out. If it does not, and you feel sure it is important, ask the judge to put the question you wish put. When you are at the Assizes the judge is addressed as "my Lord;" at Quarter Sessions he is "Sir."[1] Whilst I warn you against putting questions unless you are quite sure that they are likely tc bring out useful information, I should add that in my experience I have repeatedly seen most material

[1] Except, of course, when the chairman happens to be a peer.

evidence brought out by intelligent jurymen. I should be sorry, therefore, to discourage jurymen from the proper exercise of this right. The position of a juryman is one which gives him a very good opportunity for noting defects in the case. He knows he has a duty to perform, and this gives or ought to give him a strong interest in what is said. But he is able to do this without being over-anxious or flurried, as he sits quietly looking on with eleven others to share the responsibility.

When all that has to be said has been said, you will be addressed by the judge. This is called "summing-up." You are "not presumed to know the law."[1] The judge is; and it is his duty to tell you, where necessary, what the law is. You are to decide as to what the facts are. The way in which the judge will do his part of the work will depend upon the character of the man. Some will go maundering on in a weak way, repeating from their notes all the evidence that has been given, in the most confusing and tedious manner. Then they

[1] Lord Mansfield *v.* Rev. Dean of St. Asaph, 21. How. State Trials, 1039.

will end in this unsatisfactory way: "Now, gentlemen, if you think so-and-so, you will find for the plaintiff;[1] if you think otherwise, you will find for the defendant.[2] Gentlemen, the question is for you."

A clear-headed, intelligent, and painstaking judge will state the main facts as proved, explain their legal effect, and point out their bearing upon the case. Sometimes, when the whole thing is very simple and the facts clear, he will do what I have more than once seen a most able and excellent judge do. He will turn to the jury and say, with a droll twinkle in his eye, "Well, now, gentlemen of the jury, what do you say?"

As soon as the judge has finished, the officer of the court says, "Consider your verdict, gentlemen," and you turn round to consider it. One of the most curious sights seen in a court of justice is that of twelve jurymen discussing their verdict. In most cases they are all pretty well agreed on the main point. Where they are not, they generally ask to retire, and are taken to a room where the

[1] Or "a verdict of 'Guilty'" if it is a criminal trial.

[2] Or "a verdict of 'Not guilty'" if it is a criminal trial.

question is argued out. In civil actions, particularly on the subject of damages, this is often a matter of much difficulty. In criminal cases the jury very seldom retire, as there is rarely any reasonable doubt as to the guilt of the accused. Where a prisoner is defended by an adroit and able barrister, he will generally manage to make a number of ingenious points. All I have got to say about this is, don't be taken in; don't be led away from the real facts by mere suggestions. Of course, if there is any reasonable doubt in your mind you will give the accused the benefit of that doubt, and you will never convict a man unless you are quite sure he is guilty.

A great deal might be done, and ought to be done, to make the attendance of jurors in our courts less trying. There should always be comfortable seats and waiting rooms reserved for them. This is now the case at the Royal Palace of Justice in London, and Carlyle would not have found the duty quite so intolerable as he did in 1840.[1] But there

[1] "These three days I have been kept in special annoyance by two summonses to go up to Westminster and serve as a juryman in two different courts, both at once too. The whole aspect of the

are few, I expect, who when they have had one turn at it will not be glad, if they can manage it, to be relieved from coming again for as long a time as possible. If, therefore, you have attended at Assizes as a common juror, you should apply to the Under-Sheriff for a certificate of such service. If you have attended at Quarter Sessions, you should apply to the Clerk of the Peace (he sits just below the Chairman) for a similar certificate. This certificate, for which you will have to pay a shilling, ought to be handed, free of charge, to every juryman when his work is done. It will save you from being obliged to attend any jury or inquest (except a special jury or grand jury) for one year, if you live in Wales, Hereford, Cambridge, Huntingdon, or Rutland. If you live in any other county except Yorkshire, it protects you for two years. If you live in Yorkshire it protects

thing, the maddest-looking stew of lies and dust and foul breath, fills me with despair. . . I inquired of all persons what I had to do or look for—in vain. There was no gleam of daylight in it for me: not so much as a seat to sit down upon. At length I followed the hest of my nature and came quietly away out of the place, which I could understand nothing of. . . They have a power, it seems, of fining me to the extent of £100, but are not like to do it." (Froude's "Carlyle in London," vol. i., p. 189.)

you for four years.[1] I should mention that you are liable to be called upon to serve on a jury, even though you have not been properly summoned. Where at Assizes there are not for any reason enough jurors of those duly summoned to make up twelve, the prosecutor in criminal cases or either side in civil cases may pray for what is called a *tales*. If this is done, and you happen to be in court, you may be called upon to go into the box; and, indeed, if you are anywhere handy, say at your house or in your shop, the Sheriff may send for you, and you must go.[2] This, however, very seldom occurs.

If it should happen that there are not enough special jurymen present to make twelve, the number wanted may be taken from the common jury panel. One of the best juries I have ever seen try a difficult case[3] was thus made up, half of country squires and half of common jurymen.

[1] This seems to be the effect of ss. 40, 41, 42 of the County Juries Act, 1870, though the provision of the 19th sect. is that no one shall be summoned to serve on any jury or inquest (except a grand jury) more than once in any one year, unless all the jurors upon the list shall have been summoned during the year.

[2] 6 Geo. IV., c. 50, s. 37.

[3] An action of ejectment for forfeiture in consequence of breach of covenant to repair.

## CHAPTER VI.

### THE POLICE COURT.

A Word of Advice—Before the Magistrate—Cost of a Summons—Hardships of the Fee System.

If you take the advice I have already given[1] about keeping clear of squabbles and street rows, there will be little danger of your being dragged into the Police Court as a defendant. The Police Court, however, is the place at which complaints as well as offences of all kinds are inquired into, from the most trifling up to the most serious, from a nuisance or assault to a murder;[2] and it may become absolutely necessary that you should appear there in consequence of some wrong done to you. I can only say, "Don't go there if you can possibly avoid it." Should your servant pilfer your things, or your clerk defraud you, keep the matter to yourself and let him go. Our law, no doubt, says that

[1] See page 31. [2] See page 110.

criminal offences are not merely wrongs done to the person injured, but wrongs done to society; and that, therefore, it is your duty to pursue the offender, so that he may be brought to justice and punished in order that others may be deterred from doing likewise. This is quite true with respect to serious offences—particularly offences against the person. But I feel sure that before long it will be admitted that our present plan of dealing with smaller offences, such as thefts and frauds, is unwise; and that no one who has committed a theft is ever made honest by a vindictive punishment which taints his character for ever. Therefore, I say, bid the person who has wronged you, go in peace and sin no more. There is no moral duty, believe me, which requires that you should hand him over to the law.

Where the offence is so serious that it becomes a really public crime, the police will take charge of it, and you will be duly informed by them as to the steps to be taken, the time and place at which you are to attend during each stage of the inquiry, and so on. You are almost sure to be a witness. If so, you will find my hints to witnesses of use for your guidance, both when you are before the

magistrates and when you are called at the final trial. There are, however, a great many grievances besides criminal offences which are dealt with by the justices in the Police Court, and where very often they can not only punish the offender at once, but can redress the grievance. Even here, however, it is well if possible not to put the law in motion. You had better, in the first instance at all events, try what good-tempered remonstrance will do. If that fails, go to the office of the clerk to the magistrates, and tell him what your grievance is. He may be able to suggest some way out of the difficulty which will not render it necessary to take out a summons. If you are a poor man, particularly if you live in a town where there is a stipendiary, or paid magistrate, you had better attend at the Police Court on the day when he is sitting, and mention your grievance to him. He will almost always listen patiently to you, and advise you what you had better do; and this may save you the expense, trouble, and annoyance of further proceedings.

For taking out a summons costs 2s. 6d. at least,[1]

[1] If on oath it is 3s. 6d.

and you cannot get your complaint heard and disposed of without paying at least another 2s., namely, a shilling for showing the information to the magistrates, and a shilling fee for swearing you as a witness.[1] The same fee of a shilling has to be paid for every witness, so that a summons in the Police Court may be a very heavy expense to a poor man. It is true that if you are in the right the magistrates can in most cases compel the offender to repay the expense you have been put to. But here, again, where the defendant is a poor man, the payment even of these costs is a serious matter, often causing much distress to innocent people. It is also true that the justices are allowed to let you off from paying the fees "for poverty or other reasonable cause."[2]

I fear, however, that the poor very seldom do get

[1] Information, 1s. Summons and duplicate, 1s. 6d. If on oath, 3s. 6d. When the case is heard a fee of 1s. has to be paid for exhibiting the information, and a fee of 1s. for each witness examined, whilst for every paper produced, a fee of 1s. has to be paid. Then there is a fee of 2s. 6d. for the conviction, and another fee of 1s. for filing it. Where the proceeding is by complaint and order the fees are the same, except that the order, if made, costs only 2s. 6d., instead of 3s. 6d. The above fees are taken from a southern county, but, I believe, they are much the same in other counties and boroughs.

[2] 14 & 15 Vic., c. 5, s. 12.

let off. Those who are fairly well-to-do naturally fail to understand how great a hardship it is to the great body of the people that a few shillings must be paid before they can get protection or assistance from the law. But these few shillings are the means of living of a working man and his family for nearly a week. Here, as in the case of the County Court, I hope that before long all fees will be swept away. They are against the spirit of a law which more than 650 years ago our forefathers forced a Norman king to pass; for in the Great Charter it is declared that right or justice is to be sold to no one.[1] It will no doubt be objected that if every one were able to begin a lawsuit or take out a summons for nothing, there would be an immense increase in lawsuits and summonses, and that they would mostly be of a frivolous and vexatious kind. But if we apply our common sense to the matter, we shall find that there is really no ground for this objection. Taking the fees away will not make going to law, or going to the Police Court easy or pleasant. It will not get

[1] Magna Charta, Art. 40. "To no one will we sell, deny, or delay right or justice."

rid of any of the loss of time, or the difficulties, troubles, and annoyance for which, as I have shown, every one must be prepared who has to apply for the assistance of the law. They will still remain to make the lives of those who have to undergo them wretched. The doing away with the fees will certainly not increase the number of cases in which solicitors take up speculative claims against men of means; because to them these fees are comparatively trifling.

But even if there were any ground for this objection, it would be met by giving the judge or justice still greater power than he now has of punishing with costs or fine those who make groundless claims or complaints.

# APPENDIX.

## ACTIONS MAY BE BROUGHT IN THE COUNTY COURT TO RECOVER

**Debts** of every description not exceeding £50, or that amount of a larger debt (the excess being abandoned).

**Damages** (not exceeding £50) for

Assault,

Trespass,

Breach of Contract, express or implied, as

For non-performance of award,

For not accepting or not delivering goods sold, or for breach of warranty thereof,

For dilapidations,

For breach of guarantees of all kinds,

For breach of warranty of horses and other cattle,

For breach of indemnity, express or implied,

For negligence by servant or other person,

For breach of bye-laws.

**Against** Agents, for not accounting, not using due care, &c.,
Apothecaries and Surgeons, for unskilfulness.
Apprentices, for breach of articles.
Bailees of every kind.
Builders, for breach of agreement as to building, &c.
Carriers, for losing or damaging property, refusing to carry it, or not carrying it in a reasonable time.
Landlords, for breach of contract, express or implied.
Tenants, for ditto.
Masters, for ditto.
Servants, for ditto.
Schoolmasters, for ditto.

FOR RECOVERING POSSESSION OF HOUSES OR LAND, where the yearly rent does not exceed £50; and in the same plaint may be included a claim to the extent of £50 for rent or mesne profits, or both, down to the day of hearing. Possession of a tenement may be also obtained where rent is in arrear for one half-year, and the landlord has a right by law to re-enter for such default.

(The Fees payable on these proceedings are estimated on the weekly, monthly, or yearly rent of the tenement, according to the letting.)

**Under the "County Courts Equitable Jurisdiction Act" of 1865, the County Courts have Jurisdiction up to £500 in the following matters:—**

In Suits by Creditors, Legatees, &c.
,, for the Execution of Trusts.
,, for Foreclosure or Redemption of Mortgage.
,, for Specific Performance of Agreements.
Proceedings under the Trustees' Relief Acts.
For the Maintenance or Advancement of Infants.
For the Dissolution of Partnerships.
For Injunctions.
Proceedings under "Employer and Workmen's Act, 1875."
Proceedings under "Employer's Liability Act, 1880."

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Under **"The Summary Procedure on Bills of Exchange Act, 1855,"** now extended to the County Courts, **Actions can be brought on Bills of Exchange or Promissory Notes** from £10 up to £50; and where the Action is not defended (and the same can only be defended on good cause being shown by affidavit to the Registrar) the plaintiff may *without having to prove his claim,* enter up judgment and issue execution immediately after the expiration of 12 days from the service of the summons on defendant.

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Under **"The County Courts Act, 1875,"** where goods have been sold to be used in the way of trade, a Summons

by default can be issued; and where there is no defence, judgment can be entered up without proof of claim, and execution issue after the expiration of 16 days from time of service. This also applies to all debts where the claim exceeds £5; and also, by leave of the Judge or Registrar, to all debts under that amount.

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☞ Where the amount of debt or damage and the conditions of payment can be agreed upon between plaintiff and defendant, such agreement being made before the Registrar, judgment may be entered accordingly, at the office of the Registrar, and the attendance of either party on the Court day will be unnecessary, and *half* the hearing fees will be saved.

# INDEX.


Action, Trial of . . . . . 56
Agreements, Precautions against being drawn into . . . 14
——— for sale or purchase of goods of value of £10 or more,
When they are binding . . . . . 21
——— for sale or purchase of goods to be made or supplied,
Precautions to be taken . . . . . 26
Objections to . . . . . *ib.*
When necessary . . . . . 27
——— Stamping . . . . . 21
Altercations. How to avoid them . . . . . 31
——— When unavoidable . . . . . *ib.*, 32
Assault. How to avoid it . . . . . 31
Assizes, Course of business at . . . . . 156—9
——— Grand and Petty Juries at . . . . . 146
Attorney. The name abolished (*See* Solicitor) . . . 41
Bargains, Each party to do best for himself in . . . 33
Barrister not liable for ignorance or carelessness . . . 41
Business, Importance of some legal knowledge for men of . 19
Business transactions. Rules to be observed . . . . 13
——— To be clear as to what you want . . . . . *ib.*
——— To state clearly what you want . . . . . *ib.*
——— To state terms in writing . . . . . 14
——— Precautions against being drawn into agreement . . *ib.*
Character. Occasions on which an opinion may be prudently
stated . . . . . 29
——— When opinions should not be stated . . . . *ib.*
——— What should be said . . . . . *ib.*, 30

Character of domestic servant. Facts should be stated fairly . 30
——— When refusal to give not justifiable . . . . *ib.*
Churchwardens. Their duties with respect to jury lists. . 150
Claim, How to resist an unfair. . . . . 55
——— How to assert a just (*see* Dispute) . . . . 91
Commercial Contracts. Careless way in which they are made 19
Contracts. (*See* Agreements. Forward Contracts) . . 14
Conviction of an offence may be proved against a witness . 134
Correspondence, Agreement by . . . . . 22
——— relating to business transactions should be kept . . 21
Counsel's opinion. Its value . . . . . 41
——— Where not decided . . . . . 42
County Court. What cases can be tried there . 46 (Appendix)
——— trial by consent of both parties . . . . . 47
——— Where action must be tried . . . . . 49
——— Fees to be paid . . . . . 50
——— Hardship of this tax . . . . . *ib.*
——— Right of each side to jury . . . . . 56
Seldom claimed . . . . . *ib.*
Where it should be claimed . . . . 57
——— Trial of action in . . . . . *ib.*
Practical suggestions where defendant conducts his own case . . . . 57—62
——— Rough-and-ready way of doing the work . . . 62
——— Parties entitled to assistance of judges . . . 63
——— Hearing . . . . . 60
——— Case called on . . . . . 62
——— Statement of plaintiff or his lawyers . . . . *ib.*
——— Examination of plaintiff's witnesses . . . . 64
——— Objections: if possible to be avoided . . . . 69
Should be made to the judge . . . . *ib.*
——— Cross-examination of witnesses . . . . 69, 131
Its difficulties and dangers . . . 70, 132
How it should be done . . . . 72, 132

County Court. Where Plaintiff's case breaks down . . 75
——— Statement of case for Defence . . . . . 76
Where Defendant conducting his own case as witness . . . . . 77
Putting in writings . . . . . 78
Interruptions by other side . . . . *ib.*
——— Cross-examination of Defendant who conducts his own case . . . . . 79
Witnesses for the defence . . . . *ib.*
——— Plaintiff's right to reply . . . . . 81
——— Summing-up the evidence . . . . . 81
——— Judgment or verdict . . . . . 82
Where adverse . . . . . *ib.*
——— Application for re-hearing . . . . . 83
——— Where judgment is on point of law . . . . 84
County Court Judges. Importance of their position and duties 66
——— Their way of doing their work . . . . 62, 63, 66
——— Right of the parties to their assistance . . 63, 69
Criminal trials . . . . . 110, 117
Oath of witness . . . . . 123
Cross-examination. Its object . . . . . 70, 131
——— Its difficulty and danger . . . . . *ib.*, 132
Deposition in criminal charges.
Care to be taken that it is accurate . . . 119
Contradiction between deposition and evidence at trial 137
Dispute where claim against you.
Questions to be considered:
Is it just? . . . . . 32
How to make sure of this . . . 33, 34
——— Where claim not unfounded but too large.
Negotiations with view to settlement . . 35
Precautions to be taken . . . . . *ib.*
Final offer of terms . . . . . 36
Precautions to be taken . . . . . *ib.*

Dispute where claim against you (*continued*).
——— Where the claim should not have been made at all.
——— Offer to refer . . . . . 37
Should provide that lawyers should not be employed . . . . . *ib.*
Reference should be to one person . . . 38
——— Where offer to refer refused . . . . . 40
If result of trial doubtful . . . . . 42
Defending up to certain stage . . . 43
Keeping matters in your own hands . . 40
Obtaining advice of solicitor . . . . . 41
Choice of solicitor . . . . . 16
Payment of solicitor . . . . . 43
——— Cases which can be tried in County Court . . . 46
——— Trial by consent in County Court (*see* County Court) 47
——— Where action is brought in High Court . . . 86
——— Payment into court . . . . . 51
——— Where you have a just claim . . . . . 91
Practical suggestions . . . . . *ib.*
Evidence.
——— What is, and what is not . . . . . 57—60
——— Where what is to be proved is in writing, the writing must be produced . . . . . 140
Exceptions to rule . . . . . 142
——— Memorandum made at or near the time . . 60, 102
——— If proof of evidence taken, it should be accurate . . 130
——— Inexactness of . . . . . 71
——— Leading questions . . . . . 68, 127
——— Objections to . . . . . 127
——— Cross-examination (*See* Witness) . . . 69, 131
——— Summing-up . . . . . 81, 166
——— Expert . . . . . 131
Forward Contracts, Objections to . . . . . 26
——— Where necessary . . . . . 27

Guarantee must be in writing . . . . . 25
High Court of Justice, Parties may conduct case in . . 86
——— Difficulty of doing so . . . . . *ib.*
——— Practical suggestions . . . . . *ib.*
Hostility of witness may be shown . . . . . 136
Indefiniteness in business transactions . . . . . 13
Judges, their duties and responsibilities . . 56, 62, 63, 67, 75, 80, 81, 166
——— Summing-up evidence by . . . . . 81, 166
——— Directing jury as to law . . . . . 81
Juror, Grand, Qualification of . . . . . 146
——— At Assizes. How summoned . . . . . 156
When he should attend . . . . . *ib.*
Charge to . . . . . 157
Duties of . . . . . *ib.*
Juror, Petty or Common.
——— Qualifications of, for Supreme Court . . . 146, 153
For Royal Palace of Justice . . . . 153
For Central Criminal Court . . . . *ib.*
For Lord Mayor's Court . . . . . *ib.*
For City of London Court . . . . *ib.*
For Metropolitan County Court . . . *ib.*
For Assizes . . . . . 146
For Quarter Sessions . . . . . *ib.*
For County Courts . . . . . 153
Coroners' Inquests . . . . . 146, 154
How Summoned . . . . . 156
When and where he should attend . 159, 160, 161
Fine for non-attendance . . . . . 161
Objection to . . . . . 162
Oath in civil actions . . . . . 162
Oath in criminal trials . . . . . 163
Receive no payment . . . . . 155
Should be paid . . . . . *ib.*

Juror, Special. His qualification . . . . . 146
——— Abuses in making out list of . . . . . 151
——— How summoned . . . . . 156
——— When and where he should attend . . . . *ib.*
——— Fine for non-attendance . . . . . 161
——— Objection to . . . . . 162
——— Oath . . . . . *ib.*
——— How paid . . . . . 160
Jurors, Practical Hints to . . . . . 165
——— Are judges of the facts . . . . . 165
——— Have a right to put questions . . . . . 165
——— Should not do so needlessly . . . . . *ib.*
——— Should do so through the judge . . . . . *ib.*
——— Should not be led away by suggestion of advocate . 168
——— Should obtain certificate of service . . . . 169
Jurors, their comfort and convenience should be attended to . 168
Carlyle's experience as a juror . . . . . *ib.*
Jury, Grand. Their duties . . . . . 157
——— Uselessness of . . . . . 158
Jury in County Court . . . . . 56
Jury, Liability to serve on. (*See* "Juror, Special," and "Petty, or Common" and "Tales") . . . 169
——— Grounds of exemption . . . . . 147
——— Lists of those who are exempt . . . . . *ib.*
——— How claimed . . . . . 153
——— Irksomeness of serving on . . . . . 145
——— Expense and loss entailed by it . . . . . *ib.*
——— Difficulty of explaining law relating . . . . 154
——— Law should be amended . . . . . *ib.*
Jury Lists, how made out . . . . . 150—2
——— Objections to . . . . . 152
Jury, Petty or Common. Their duty in criminal cases . . 159
——— Giving prisoner in charge to . . . . . 163
——— Their verdict . . . . . 168

Justices, Applications to . . . . . 175
Law, Reasons for not going to . . . . . 11
Law, Rules which should be generally known.
——— Agreement when its terms are in writing must be produced. . . . . 20
——— Bargain for sale or purchase of goods of value of £10 or more . . . . . 21—6
——— Libel and slander, General rule as to liability for . 28
Lawyer, Choice of . . . . . 16
Lawyers, This book not meant to make men their own . . 15
Legal training of use to men of business . . . . . 19
Letters, Originals and copies should be kept . . . . . 141
——— How proved where originals have been lost or destroyed . . . . . 142
Libel and slander, General rule of law as to . . . . . 28
Malice, when it will be implied in statement as to character . 28
Notices to produce and admit letters and writings . . . 141
Oath of witness in civil cases . . . . . 123
——— in criminal cases . . . . . *ib.*
——— Provision as to witnesses (in all cases) who object to or cannot take oath . . . . . 124
Offences, The legal view of . . . . . 174
——— Minor and serious . . . . . 110
——— How dealt with . . . . . *ib.*
——— When you should prosecute . . . . . 174
——— When you should not . . . . . 173
Oral evidence of written documents, when it is admissible . 142
Overseers, their duties with respect to jury lists . . . 150
Payment into court . . . . . 51
Police Court, how to keep out of it . . . . . 173—5
——— Cases dealt with in it . . . . . 137
——— Practical hints to those seeking redress . . . 175
"Private and confidential." When these words may be used. 29
Proofs. (*See* Evidence) . . . . . 130

Prosecution of offences. (*See* Offences) . . . . . 173
——— Costs of proceedings . . . . . 175
——— Their hardship on the poor . . . . . 176
——— Power of justices to remit . . . . . 176
Re-examination: its object . . . . . 140
Reference, offer to refer, and other steps. (*See* Dispute) . 37
Servants, Character of. (*See* Character) . . . . . 30
Slander, How to avoid action for . . . . . 27
Solicitor, When you should consult . . . 40, 49, 83, 85
——— Choice of . . . . . 16
——— Obtaining his advice . . . . . 44, 47, 49
——— Duty of . . . . . 41
——— Liable for carelessness or ignorance . . . *ib.*
——— Payment of . . . . . 46
Solicitors' bills. Why they are large . . . . . 46
Statute of Frauds . . . . . 21
——— Vexatious litigation which it has caused . . . 24
Supreme Court, Proceedings in . . . . . 48
Swearing jury in civil actions . . . . . 162
——— in criminal trials . . . . . 163
——— Witnesses . . . . . 123
*Tales*, when necessary . . . . . 170
Telegram, Agreement may be made by . . . . . 22
Tender of sum due . . . . . 51
Trial of civil case. (*See* County Court.) . . . . . 56
——— of criminal charge . . . . . 120
Verdict of jury . . . . . 168
Will, How to witness a . . . . . 99
——— Precautions to be taken . . . . . *ib.*
"Without prejudice." Vagueness of these words . . . 36
——— Suggestion of definite words . . . . . *ib.*
Witness: how you may become one. . . . . 97
——— Caution as to becoming one . . . . . 98
——— How to witness a will . . . . . 99

Witness in civil cases. How you may be compelled to give evidence . . . . . 104
On payment of "reasonable expenses" . . 105
What are "reasonable expenses" . . . *ib.*
Compensation for loss of time and earnings . *ib.*
May refuse to testify until expenses paid . *ib.*
When you should attend. . . . . 107
Consequences of not attending . . . 108
Oath . . . . . 123
Production of letters and writings . . . 109
Witness in criminal cases. (*See* Witness in witness-box.)
Duty imposed by law . . . . . 111
How enforced . . . . . 112, 115
Moral duty . . . . . 111
Burdensomeness of duty . . . . 111, 116
No tender of expenses necessary . . . 113
Exception . . . . (*Note*) 113
Expenses allowed only after attendance . 113, 115
Objections to this . . . . . 116
Scale of allowance . . . . . 113, 115
How evidence is got up . . . . . 117
Precautions to be taken . . . . 118
What you can and what you cannot prove 57, 60, 102, 118
Depositions. Care to be taken that they are accurate . . . . . 119
Discrepancies between deposition and evidence. (*See* Witness in witness-box.) . . . 137
Witness. Attendance at trial in civil and criminal cases . 120
——— Ordering witnesses out of court . . . . . 121
——— who must withdraw . . . . . 121
——— Practical hints . . . . . 122
Witness in witness-box.
The oath . . . . . 123

Witness in the witness-box (*continued*).
Affirmation by those who object to oath . . 124
Declaration by those who object to oath . . 125
——— Practical hints . . . . . 76, 122
Where party conducts his own case . . 77
Speak clearly . . . . . 126
Stick to facts . . . . . 129
State all you know . . . . . 130
Opinions not to be expressed . . . . *ib.*
Exceptions . . . . . *ib.*
——— Examination-in-chief . . . . . 68, 79
Refreshing memory. . . . . 129
Leading questions . . . . . 68, 80
Objections and interruptions . . . 78, 80
——— Cross-examination. . . . . 69
How it should be done. (*See* Cross-examination) . . . . . 72
Browbeating . . . . . 133
As to matter outside dispute not allowed 134, 135
As to character . . . . . 134
Previous conviction. . . . . *ib.*
As to interest in case . . . . . 135
As to hostility to either side . . . . *ib.*
As to previous inconsistent statement . . 136
Where it is in writing, *e.g.*, deposition . . 137
——— Re-examination: its object.
Writings, should be kept. . . . . 141
——— Notice to produce . . . . . *ib.*
——— Production of . . . . . *ib.*
——— Notice to admit . . . . . *ib.*

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